

# **Struggles for Power and Unity**

## ***Constitutional Designs in the Palestinian Authority***

**Tonje Merete Viken**



**MA-thesis in Middle Eastern and North-African Studies**

**Spring 2008**

**Asian and African Studies program at the**

**Department of Culture Studies and Oriental Languages**

**Faculty of Humanities**

**UNIVERSITY OF OSLO**



## Acknowledgements

I want to thank my supervisor Dag H. Tuastad at the University of Oslo for challenging and stimulating feedback, and for always making me think twice about what I was actually writing about.

Thanks to Bahjat for his excellent work as my interpreter, and for his patience and creativity in dealing with Gaza traffic and the PLC bureaucracy.

I would especially like to thank all my informants in Gaza and Ramallah who took time out from their busy schedules to meet with the student from Norway. I am amazed at their patience, and I sincerely hope that I have treated their confidence with fairness and respect. Thanks also to Muhammed and Gudrun for help and advice during my stay in Gaza.

I am indebted to Hilde Katrine Haug for commenting on the thesis underway and for giving me constructive advice. Thanks to Cecilie Endresen for proof reading. I am also grateful to Kåre Vollan for answering questions and providing me with information that I would otherwise have been unable to obtain.

I also want to thank my fellow students, Andrea Liven Rivrud and Thomas R. Berdal for good times and our discussions in Tel Aviv and over the phone during our respective field works. I am also grateful to Martin B. Holter, Hilde Lysengen Havro, Ingrid Baltzersen and Erik Bolstad for commenting, listening to countless monologues on the Basic Law, and for asking difficult questions.

Thanks to my friends Inger and the two Ingrids, Kristin, Synne, Anne and Audhild for tolerating my obsessiveness during the writing of this thesis.

And finally, thanks to my parents Astrid and Ola for their openmindedness when their daughter told them she wanted to go back to school. I had the best time!



# Table of contents

<b>INTRODUCTION: THE PALESTINIAN CONTEXT .....</b>	<b>1</b>
<b>1. THEORETICAL FRAMEWORK AND METHODOLOGICAL CONCERNS .....</b>	<b>4</b>
Research question.....	4
Main theoretical assumptions .....	5
<i>Constitutions are not above politics</i> .....	5
<i>Constitutions can be nonconstitutionalist</i> .....	7
<i>Evaluating constitutional reform</i> .....	9
Previous research.....	10
Methodological concerns .....	12
<i>Fieldwork</i> .....	12
<i>The texts</i> .....	14
<i>Translations and usage</i> .....	16
Thesis outline .....	17
 <b>PART I: DRAFTING AND AMENDING THE BASIC LAW .....</b>	 <b>19</b>
<b>2. 1994-1997: THE LOGIC OF THE PALESTINIAN BASIC LAW .....</b>	<b>19</b>
The Palestinian electoral system .....	19
The Palestinian system of government.....	22
The PLO drafts: Nonconstitutional presidentialism.....	23
The PLC Basic Law: Constitutional presidentialism .....	27
Paradoxes in Palestinian constitutional design.....	31
 <b>3. THE 2003 AMENDMENT: DE-ARAFATIZING PALESTINIAN POLITICS .....</b>	 <b>34</b>
The 2003 amendment of the Basic Law .....	35
Immediate impact: Abbas resigns .....	38
Cosmetic or real?.....	41
 <b>4. THE 2005 AMENDMENT: PREPARING FOR HAMAS.....</b>	 <b>46</b>
Passing a new election law .....	48
Rejected proposals for amending the Basic Law .....	53
The 2005 proposals in light of the 2003 amendment .....	57

<b>SUMMARY PART I .....</b>	<b>59</b>
 <b>PART II: CABINET POWER AFTER THE 2003 REFORM .....</b>	 <b>60</b>
<b>5. 2003-2007: REFORMING THE “SECURITY CHAOS” .....</b>	<b>60</b>
Constitutional framework.....	61
Legislative efforts.....	62
Contesting competencies .....	63
Security developments in light of the 2003 amendment .....	69
 <b>6. 2003-2007: REFORMING DIPLOMACY .....</b>	 <b>72</b>
Constitutional framework.....	73
Reform attempts .....	74
Bypassing the cabinet.....	78
Palestinian diplomacy in light of the 2002-2003 reforms .....	80
 <b>SUMMARY PART II.....</b>	 <b>82</b>
 <b>PART III: REASSERTING THE PRESIDENCY .....</b>	 <b>83</b>
<b>7. 2006: PASSING THE HIGH CONSTITUTIONAL LAW .....</b>	<b>83</b>
Constitutional framework.....	83
Drafting the High Constitutional Court Law.....	84
The High Constitutional Court Law in light of the 2003 amendment .....	87
 <b>8. 2006-2007: INTERPRETING THE BASIC LAW .....</b>	 <b>89</b>
Constitutional issues.....	90
<i>Calling for referendums .....</i>	<i>90</i>
<i>Dismissing the parliament and holding early elections .....</i>	<i>93</i>
<i>Dismissing the cabinet.....</i>	<i>95</i>
<i>Declaring a state of emergency and ruling by decree .....</i>	<i>98</i>
A complete reversal.....	102
 <b>SUMMARY PART III .....</b>	 <b>105</b>
<b>MAIN CONCLUSION: THE CIVILIZING FORCE OF HYPOCRISY?.....</b>	<b>106</b>

## **TABLES**

<i>Main primary sources .....</i>	16
<i>Failed PLC sessions in July 2007 .....</i>	98
 <i>Bibliography.....</i>	111
<i>List of interviews in chronological order.....</i>	120
<i>Appendix I: Website of the Ministry of Foreign Affairs .....</i>	123
<i>Appendix II: Background, the Ministry of Foreign Affairs .....</i>	124

# Struggles for Power and Unity: Constitutional Designs in the Palestinian Authority

## ***Introduction: The Palestinian context***

The topic of this thesis is the interplay between political context and Palestinian constitutional development from the inception of the Palestinian Authority (PA) in 1993 until the aftermath of the collapse of the National Unity Cabinet in June 2007. The thesis traces the drafting and various amendments of Palestinian Basic Law, which was to serve as a temporary constitution for the PA until the establishment of an independent state and a permanent constitution could be achieved.

The PA was the result of the so-called Oslo Accords, a series of agreements between the state of Israel and the Palestinian Liberation Organization (PLO) from 1993 until 1995. Here, the PLO recognized the state of Israel in return for recognition of the PLO as a negotiating partner for the future.<sup>1</sup> The PA was an interim body that was to administer the Palestinian Territories for a transitional period of five years, during which the PLO and Israel were to negotiate a permanent settlement. The Basic Law was to be drafted by the PLO and to be adopted by the Palestinian Legislative Council (PLC) as soon as the first parliamentary elections had been held.

The process of drafting a constitution for an independent Palestine had started a few years earlier. With the Palestinian declaration of independence in 1988, the PLO Central Council was given the authority to approve a Palestinian Basic Law.<sup>2</sup> The resolution remained sleeping until the Oslo Accords provided for the establishment of the PA in 1994. The PLO was again authorized to draft a Basic Law which was to serve as an interim constitution. However, when the PLC convened for the first time in the summer of 1996 after the first Palestinian elections, the Basic Law had still not been completed. The PLC decided to take on the completion of the Basic Law themselves, rather than wait for the cabinet to formally present them with a finished draft.<sup>3</sup>

At this point, the Palestinian leadership lost control over the drafting process. By engaging in an increasingly publicized drafting process an emerging reform coalition of Palestinian parliamentarians and intellectuals sought a different kind of Arabic political system. They aimed to undermine the emerging authoritarianism of the PA by creating a Basic Law which would

---

<sup>1</sup> For a further discussion on the implications of this asymmetry, see Burhan Dajani, "The September 1993 Israeli-PLO Documents: A Textual Analysis," *Journal of Palestine Studies*, Vol. 23, No. 3 (Spring 1994), 6-9.

<sup>2</sup> Nathan J. Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Politics* (Berkeley: University of California Press, 2003), 67.

<sup>3</sup> Brown, *Palestinian Politics after the Oslo Accords*, 71.



provide for a progressive democracy with real limitations on executive power.<sup>4</sup> A total number of eight drafts were made before the PLC produced the ninth, also known as the First Reading. A number of revisions resulted in the Third Reading in October 1997, which was passed by the PLC in 1997. During this period, the various drafters received comments from legal experts, scholars, activists and foreign advisers.<sup>5</sup> Then President Yasser Arafat<sup>6</sup> refrained from ratifying the document until he came under pressure to introduce reforms in 2002. Since then the Basic Law has been amended twice.

The Basic Law was written during the post-Cold War resurgence of constitution making as part of a broad political reconstruction after the downfall of the Soviet Union led former East Bloc countries to replace Communist party rule with parliamentary democracy. The democratic transition in the old East Bloc countries sparked new optimism and faith in the possibility of *creating* democracies. During the second half of the 1990s, more than a billion dollars was spent on rule of law projects all over the world,<sup>7</sup> and “democracy has been marketed aggressively as a product that ought to be available to everyone”.<sup>8</sup> Constitutions were seen as vital contributions in these transitions. At the same time the PA is geographically situated in the Middle East, where constitutional history has been shaped by the demise of the Ottoman Empire and the presence of the Great Powers.<sup>9</sup> Constitutions were designed to enable existing regimes through fiscal reforms, to define new relationships with the imperial powers or establish sovereignty, to resolve issues of succession, or to proclaim new ideological directions.<sup>10</sup> In short, Arab constitutions aimed at strengthening and enabling the state, not at limiting the executive.<sup>11</sup>

The PA has, however, never been a state. The PA is an interim administrative body which presides over an undefined territory. It only represents part of the Palestinian population, it cannot enter relations with other states, and it does not maintain the monopoly of armed force within its own territories. The Basic Law itself expanded on the political system that was outlined in the

---

<sup>4</sup> Brown, *Palestinian Politics after the Oslo Accords*, 78; and Naseer H. Aruri and John J. Carroll, “A New Palestinian Charter,” *Journal of Palestine Studies*, Vol. 23, No. 4. (Summer 1994), 5-17.

<sup>5</sup> For a full account of the drafting process, see Adrien Katherine Wing, “The Palestinian Basic Law: Embryonic constitutionalism,” *Case Western Reserve Journal Law*, Vol. 31, No. 2&3 (Spring 1999), 402-404; and Brown, *Palestinian Politics after the Oslo Accords*, 70-71.

<sup>6</sup> For English versions of Arabic names, I have chosen the set of spelling forms that appears most frequently in my source material.

<sup>7</sup> Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Reconstruction* (Cambridge: Cambridge University Press, 2000), 2.

<sup>8</sup> Donald L. Horowitz, “Constitutional Design: Proposals Versus Processes,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 16.

<sup>9</sup> See Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Governments* (Albany: State University of New York Press, 2002).

<sup>10</sup> Brown, *Constitutions in a Nonconstitutional World*, 15-16, 35-36, 41, 62, 67, 89.

<sup>11</sup> Daniel Brumberg, “Liberalization versus Democracy,” in *Uncharted Journey: Promoting Democracy in the Middle East*, eds. Thomas Carothers and Marina Ottaway (Washington: Carnegie Endowment for International Peace, 2005), 23.

various agreements between Israel and the PLO. The most important of these was the Israeli-Palestinian Interim Agreement of 1995,<sup>12</sup> which outlined detailed specifications on the limitations of the PA's jurisdiction during a transitional period not to exceed five years (Preamble). Words like "constitution", "minister" and "cabinet" were carefully avoided so as to avoid hinting at Palestinian statehood. Furthermore, the Israeli occupation imposed major constraints on even the autonomy that the PA was supposed to possess. The PA can be seen as a transitional regime that was designed to meet Israeli security needs.<sup>13</sup> The security imperative entrenched the existing penchant for executive centralization of power within the PLO into the PA, which was to exercise extremely limited powers within an «autonomous» area. This authority presided over a fragmented geographical area interspersed with settlements and Israeli military zones over which the PA had no jurisdiction. This raises the question of whether constitution building, or constitutional development, is a meaningful concept in analysis of a nonsovereign entity in general, and the PA in particular. My interest lies with the nature and effect of the *attempt* – not in its potential for success. Although Palestinian constitution building has taken place in the context of limited autonomy under military occupation, constitutional drafters have grappled with the same kind of choices and available models as have constitutional drafters in nascent states. Their constitutional choices have been of consequence, irrespective of the real or perceived futility of the initial project.

---

<sup>12</sup> *The Israeli Palestinian Interim Agreement*, Washington, D.C.; 28 September 1995. Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> (last accessed 15 February 2008).

<sup>13</sup> Roland Friedrich, *Security Sector Reform in the Occupied Palestinian Territories* (Jerusalem: PASSIA, 2004), 23.

*Palestine is, in short, a model liberal democracy. Its most significant flaw is that it does not exist.*

- Nathan J. Brown

## **1. Theoretical framework and methodological concerns**

### ***Research question***

The formal side of Palestinian politics has generally been considered insignificant compared to the informal power structures. Little attention has been devoted to the formal aspects of the political system and how these have been affected by internal power struggles, external intervention and the demand to secure Israel. Nonetheless, constitution making has been a constant process throughout the whole political life of the PA. Similar processes in Iraq and Afghanistan have been subject to a great deal of consideration, but the PA's constitutional process has been ongoing since 1993. That provides a good opportunity to observe the mutual relationship between constitutional development and domestic and international politics in the PA.

The Palestinian Basic Law was written in the intersection between local power struggles and great power politics. Both the U.S. and the European countries pursued multiple agendas and interests where democracy was one of several competing goals.<sup>14</sup> For Israel, the overall goal was to achieve security. For Palestinians, the overall goal was sovereignty. My first main question is how these various interests have affected Palestinian constitutional development. More specifically, I aim to discuss the development of the executive as envisioned in the Basic Law, and whether the PA has evolved in the direction of constitutionalist or nonconstitutionalist rule. By constitutionalist I refer to the idea that executive power should be limited. Conversely, a nonconstitutionalist constitution would not limit, but enable executive power. The distinction will be elaborated on later in this chapter.

Secondly, I wanted to explore whether the Basic Law has been able to affect political outcomes. I decided to approach this matter by focusing on the 2003 amendment of the Basic Law, which converted the Palestinian political system from a presidential to a semi-presidential system by furnishing the executive with a prime minister. The aim was to empower a reform cabinet and restrict the powers of the presidency. The second main question is whether the empowered cabinet has been able to exercise its powers as laid out in the Amended Basic Law.

---

<sup>14</sup> Carothers and Ottaway, "The New Democracy Imperative," in *Uncharted Journey*, eds. Carothers and Ottaway 6; and Nathan J. Brown, "Requiem for Palestinian Reform: Clear Lessons from a Troubled Record," Carnegie Endowment Democracy and Rule of Law Program, Middle East Series, No. 81 (Washington: February 2007), [http://www.carnegieendowment.org/files/cp\\_81\\_palestine\\_final.pdf](http://www.carnegieendowment.org/files/cp_81_palestine_final.pdf) (last accessed 20 January 2008), 14.

## **Main theoretical assumptions**

A study of Palestinian constitutional reforms requires a multidisciplinary approach drawing on theories of institutional design, democratization processes and constitutional law. Below is an outline of the main theoretical perspectives that I lean on. In addition, I have prioritized literature on Palestinian politics and history and Arab constitutions in order to minimize the risk of misinterpreting the legal texts or miscalculating their origins and effects in a Palestinian context.

### **Constitutions are not above politics**

A constitution “consists of a set of rights, powers and procedures that regulate the relationships between public authorities in any state, and between the public authorities and individual citizens”.<sup>15</sup> There are several approaches to constitutions and how they work. Whereas liberal theories see law as unaffected by political context, the realist approach conceives of law as intimately related to politics.<sup>16</sup> In a realist view, constitutions are seen as bargains which reflect the prevailing power balance at the time of drafting.<sup>17</sup> In such a view, major divisions and conflicts can be a main incentive to settle for a common constitutional framework.<sup>18</sup> Consequently, conflict is vital to reach a broad acceptance for a constitutional framework.

According to the idealist view, constitutions express the state’s fundamental political arrangements and determine the identity of the political identity. Constitutions are the foundation of the democratic order.<sup>19</sup> They transcend their political origins and provide a fundamental break with the old.<sup>20</sup> Whereas realist theories conceive constitution making as the result of considerations of partisan advantages,<sup>21</sup> idealist theories see constitutions as the result of normative, impartial debates over desirable outcomes.<sup>22</sup> Kenneth Ka-Lok Chan has pointed out that in reality, “institutions are attributable to the interplay between normative arguments and partisan considerations”.<sup>23</sup> According to Ruti Teitel, neither idealist nor realist theories fully explain the role of constitutions under periods of political change. Teitel coins the concept of “transitional constitutionalism” to analyze constitutionalism in periods of political change. During political transitions, “transitional constitutionalism not only is constituted by the prevailing

---

<sup>15</sup> David Robertson, *The Routledge Dictionary of Politics*, third edition (London: Routledge Taylor & Francis Group, 2004), 115.

<sup>16</sup> Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation,” *Yale Law Journal*, Vol. 106, No. 7 (May 1997), 2057.

<sup>17</sup> Jon Elster et.al., *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1998), 77.

<sup>18</sup> Stephen Holmes, “Gag Rules,” in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad, third edition, Studies in Rationality and Social Change (Cambridge: Cambridge University Press, 1988), 28, 37.

<sup>19</sup> Cass R. Sunstein, *Designing Democracy: What Constitutions do* (Oxford: Oxford University Press, 2001), 6.

<sup>20</sup> Horowitz, “Constitutional Design,” 26.

<sup>21</sup> Elster et.al., *Institutional Design in Post-communist Societies*, 77.

<sup>22</sup> Sunstein, *Designing Democracy*, 7.

<sup>23</sup> Kenneth Ka-Lok Chan, “Idealism versus Realism in Institutional Choice: Explaining Electoral Reform in Poland,” *West European Politics*, Vol. 24, No. 3 (July 2001), 70.

political order, but is also constructive of the perception of political change [...] and effect further political change in the system”.<sup>24</sup> Under such political transitions, constitution making often begins with a provisional constitution pending subsequent and more permanent constitutions.<sup>25</sup>

Here, idealist and realist theories are jointly applied. Idealist theories focus on the practical aspects of constitutional design.<sup>26</sup> Giovanni Sartori has for example compared institutions to “engines” that are “unlikely to work” unless they employ the right combination of punishments and rewards.<sup>27</sup> Constitution making according to Sartori is “an engineering-like task”.<sup>28</sup> Sartori provides useful tools for conceptualizing and contrasting the various stages in Palestinian constitutional development. His theories on constitutional design will here be applied in a discussion of the technical aspects of the Palestinian political system and distribution of power as laid out in the Basic Law. Realist theories, on the other hand, are more concerned with the actual process of constitution-drafting. This approach will underpin my discussion on why certain choices were made at the expense of others.

The Basic Law was written by Palestinian constitutionalists who had little backing among an ambivalent leadership who feared that the Basic Law would be an obstacle to maximum flexibility in the nationalist struggle.<sup>29</sup> The PA was also under heavy external pressure to subdue leftist and Islamist factions who rejected the Oslo Accords. From an Israeli perspective, a fully developed Palestinian democracy might be detrimental to Israeli security.<sup>30</sup> Within the Palestinian political elite, there was disagreement as to whether democracy was prerequisite to liberation, or whether liberation would have to be achieved first. The Basic Law would have to reflect the needs to obtain democratic legitimacy and enable the executive at the same time.

Menachem Klein has pointed out that after the establishment of the PA, “classical concepts like armed struggle, revolution and steadfastness were marginalized in favor of new concepts such as institution building, democratic legitimization, election, representation, and realism”.<sup>31</sup> However, it is highly unlikely that drafters of the various documents or the Basic Law were informed by a common and consistent idea of what these concepts were to entail. While

---

<sup>24</sup> Teitel, “Transitional Jurisprudence,” 2025.

<sup>25</sup> Teitel, “Transitional Jurisprudence,” 2057.

<sup>26</sup> Chan, “Idealism versus Realism in Institutional Choice,” 60.

<sup>27</sup> Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, second edition (New York: New York University Press, 1994, 1997), ix.

<sup>28</sup> Sartori, *Comparative Constitutional Engineering*, 198.

<sup>29</sup> Brown, *Palestinian Politics after the Oslo Accords*, 83; and Barry Rubin, *The Transformation of Palestinian Politics: From Revolution to State-Building* (Cambridge: Harvard University Press, 1999), 53.

<sup>30</sup> Khalil Shikaki, “The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine,” *Journal of Palestine Studies*, Vol. 25, No. 2 (Winter 2006), 9-10.

<sup>31</sup> Menachem Klein, “By Conviction, Not By Infliction: The Internal Debate Over Reforming the Palestinian Authority,” *Middle East Journal*, Vol. 57, No. 2 (Spring 2003), 199.

there may have been no clear and consistent design, there were long term goals on behalf of politically relevant actors. The Palestinian politically relevant elite consists of actors that are in a position to make “strategic decisions or participate in decision making on a national level, contribute to defining political values (including the definition of ‘national interests’), and directly influence political discourse on strategic issues decision making on the national level.”<sup>32</sup> In the Palestinian context, this comprises the “international community”, which will here refer to the donors and the Quartet.<sup>33</sup> Both the US and the European countries had multiple agendas and interests where democracy was only one of several competing goals.<sup>34</sup> For Israel, the overall goal was to achieve security. For Palestinians, the overall goal was to achieve sovereignty. By signing the Oslo Accords, they opted to try Palestinian institution building as a main strategy to achieve their respective goals.

The drafting process cannot be seen as disconnected from the immediate political context of the occupation by Israel and the internal power struggles within the PA. Both external constraints and domestic concerns bore on what alternatives were available. An analysis of the Basic Law will reveal adherence to democratic ideals, realistic considerations of what is possible in the Palestinian context as well as group interests and perceived possibilities of personal gain.

### **Constitutions can be nonconstitutionalist**

Teitel points out that there is a “normative proposition that various legal responses should be evaluated on their prospects for democracy”.<sup>35</sup> One of the challenges in this study has been to determine how far I should go in discussing the democratic potential of the Basic Law. There seemed to be several good reasons to avoid this path. Firstly, democracy can be defined in any number of ways spanning from minimalist procedural definitions to wider definitions comprising economic and social relations.

Secondly, it would make little sense to discuss the Basic Law in light of one clearly defined notion of democracy, when it seems unlikely that the drafters of the Basic Law and the various interests they had to consider were informed by a uniform vision of what democracy is or

---

<sup>32</sup> See Ahmed Badawi, “Policy Failure, Power Relations and the Dynamics of Elite Change in Palestine,” *Orient*, No. 4 (2003), 555-566. Also available from Miftah (The Palestinian Initiative for the Promotion of Global Dialogue & Democracy), <http://www.miftah.org/PrinterF.cfm?DocId=4406> (last accessed 12 February 2008), pages unnumbered.

<sup>33</sup> The donor community is coordinated by the Ad Hoc Liaison Committee (AHLC), which was established in 1993. It is chaired by Norway, and the World Bank serves as its secretariat. Additional members are Canada, European Union, Japan, Russia, Saudi Arabia, and United States. The Palestinian Authority, Israel, Egypt, Jordan, Tunisia and the United Nations are associated members. The Middle East Quartet was established in 2002 as a response to the second Intifada. It consists of the UN, the USA, the EU and Russia.

<sup>34</sup> Carothers and Ottaway, “The New Democracy Imperative,” 6.

<sup>35</sup> Teitel, “Transitional Jurisprudence”, 1011.

how the PA should function. It remains contested whether democracy in whatever form was even a priority on behalf of the politically relevant elite.<sup>36</sup> Thirdly, part of this discussion rests on the point that even if constitutions are central to democratic development, constitutions may well serve nondemocratic ends. Nathan J. Brown has pointed out that there is no causal relation from having a constitution and separation of powers to democracy. Although democracy does require some form of constitutionalism, constitutionalism does not require democracy. Brown defines constitutionalism as the ideologies and institutional arrangements that promote the limitation and definition of means of exercising state authority. However, constitutions may organize power without limiting it. They may serve to enhance governmental power and make it more efficient, or they may be designed to strengthen different groups of the political elite, as reflected in the relationship between for instance the parliament and the president. Constitutions not intended at limiting government can be referred to as *nonconstitutionalist*.<sup>37</sup>

The Basic Law will here be evaluated on its constitutionalist and nonconstitutionalist qualities, not on its prospect for democracy. The Basic Law was to function as a constitution for the PA in the transitional phase. The idea of transition implies a shift from one regime to another. As for the PA, it was not clear where the transition would lead in terms of territory or degree of independence. The PA was tasked with institution building before independence had been achieved, a state described by Glenn Robinson as an incomplete revolution.<sup>38</sup> In such a setting, a major challenge is to reconcile the concept of *constitutionalism* with revolution. Teitel has pointed out that: “Revolutionary periods and their aftermath are times of political flux, and, as such, present tensions with constitutionalism, which is ordinarily considered to bind the political order.”<sup>39</sup> The Palestinian leadership as embodied in the PA executive and the PLO Executive Committee has generally been anxious to avoid limitations on executive power. By contrast, reformists within Fatah<sup>40</sup>, the PLC and the NGOs have seen accountable and delimited institutions with strong parliamentary oversight capabilities as an alternative route to independence and prerequisite to post independence democracy. In the case of the PA, the relationship between

---

<sup>36</sup> Mushtaq Husain Khan, “Evaluating the emerging Palestinian state” in *State Formation in Palestine: Viability and Governance during a Social Transformation*, eds. Mushtaq Husain Khan et. al. (London: RoutledgeCurzon, 2004), 43.

<sup>37</sup> Brown, *Constitutions in a Nonconstitutional World*, 8-13, 92.

<sup>38</sup> Glenn E. Robinson, *Building a Palestinian State: The Incomplete Revolution*, Indiana Series in Arab and Islamic Studies (Bloomington: Indiana University Press, 1997), 176-177.

<sup>39</sup> Teitel, “Transitional Jurisprudence,” 2051.

<sup>40</sup> Fatah was formally founded in Kuwait in 1959 by Yasser Arafat and associates. They advocated armed struggle to liberate all of Palestine by Palestinians, while remaining independent of all Arab governments. Fatah came to be the largest and most important faction within the PLO. For more on Fatah’s founding and ideology, see Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (Oxford: Oxford University Press, 1997), 71, 80-87.

constitutionalism and revolution has as of today not been resolved. The Basic Law will here be seen as reflecting both constitutionalist and nonconstitutionalist ideas.

## **Evaluating constitutional reform**

The Palestinian Basic Law was designed to last for the transitional period. When the transitional period expired in 1999, the Basic Law had still not been ratified by President Arafat, but was promulgated as late as 2002 as part of a broader reform effort. In 2003, it was amended in order to conform to international reform demands on the PA. The Basic Law was further amended in 2005, where all references to the interim period were eliminated. This process of drafting and amending conforms to Teitel's observation that constitution making under transitions is an evolutionary process whereby constitutions are created in fits and starts: "Despite our ordinary notions of constitutional law as the most forward-looking and enduring of legal forms, transitional constitution-making is frequently impermanent, and involves gradual change."<sup>41</sup> Consequently, the concept of reform is central to this discussion. The 2003 amendment was part of a whole range of measures aimed at streamlining the Palestinian security sector, enhancing financial transparency and reforming Palestinian institutions. Reflecting a wide array of political agendas, the Palestinian political system was converted from a presidential to a semi-presidential system. Here, Palestinian constitutional development will be measured against the expressed goals of the 2003 amendment, which was to enhance cabinet power and weaken the presidency.

In an essay on Middle Eastern reform, Marina Ottaway distinguishes between cosmetic and significant reforms. Cosmetic reforms are reforms that do not affect the distribution of power, but that are deliberately designed to give the appearance of change, while at the same time preventing change.<sup>42</sup> Reforms are significant when they "start altering the distribution of power and the character of the political system".<sup>43</sup> Ottaway argues that significant reforms must induce a political paradigm shift whereby those in control, and also their opponents, abandon "old assumptions about the fundamental organization of the polity, the relation between the government and the citizens, and thus the source, distribution, and exercise of political power".<sup>44</sup> Reform measures should have an effect in a five year perspective, not in the distant future.<sup>45</sup> Significant reforms affect or have the potential for affecting "the distribution of power and to

---

<sup>41</sup> Teitel, "Transitional Jurisprudence," 2057.

<sup>42</sup> Marina Ottaway, "Evaluating Middle East Reform: How Do We Know When It Is Significant?," Carnegie Endowment Democracy and Rule of Law Program, Middle East Series, No. 56 (Washington: February 2005), <http://www.carnegieendowment.org/files/CP56.Ottaway.FINAL.pdf> (last accessed 22 January 2008), 11.

<sup>43</sup> Ottaway, "Evaluating Middle East Reform," 3.

<sup>44</sup> Ottaway, "Evaluating Middle East Reform," 6.

<sup>45</sup> Ottaway, "Evaluating Middle East Reform," 9.



make power subject to a popular mandate. They must contribute to limitations on the executive, allow the emergence of other centres of power and introduce an element of pluralism”.<sup>46</sup>

Glenn E. Robinson has pointed out that the main ruling strategies for the old PLO elite were personalization and deinstitutionalization of politics.<sup>47</sup> In the context of the PA, reforms that would challenge old assumptions about power would be reforms that strengthened institutions on behalf of individuals. I will discuss whether the constitutional amendment was able to play such a role. Ottaway’s criteria will be applied whenever relevant to the discussion.

## **Previous research**

Literature on the Oslo Accords and the PA has become increasingly critical. One strand of the literature has focused on the political culture within the in the PA. The emphasis has been on corruption, clientelism and the authoritative leadership style of the late president Arafat.<sup>48</sup> Another strand of criticism has been directed towards the terms of the Oslo agreement itself and the impossibility of building functioning institutions under the conditions of the occupation and expansion of settlements.<sup>49</sup>

Constitutional and legal issues in the PA have been treated extensively in As’ad Ghanem’s *The Palestinian Regime: A Partial Democracy*. Published one year prior to the promulgation of the Basic Law, *The Palestinian Regime* shows how the negligence of constitutional and legal issues in the initial years of the PA hampered democratic development. Ghanem argues that the local political structures that had emerged under the first intifada were “frozen” by the Oslo Accords, and that the new structure set up by the PLO was undemocratic and noncompetitive.<sup>50</sup> Ghanem provides a thorough presentation of the internal decision making procedures within the PLC, the formal power structures of the PL and the first Palestinian elections.

Nathan J. Brown has written extensively on Arab constitutions in general and the Palestinian Basic Law in particular. In *Constitutions in a Nonconstitutional world: Arab Basic Laws and the Prospects for Accountable Governments*, the Palestinian Basic Law is discussed in the broader context of Arab constitution making from the 19<sup>th</sup> century until today. In *Palestinian*

---

<sup>46</sup> Ottaway, “Evaluating Middle East Reform,” 10.

<sup>47</sup> Robinson, *Building a Palestinian State*, 181-182.

<sup>48</sup> Examples are As’ad Ghanem, *The Palestinian Regime: A “Partial Democracy”* (Brighton: Sussex Academic Press 2001); and Rex Brynen, “The Neopatrimonial Dimension of Palestinian Politics,” *Journal of Palestine Studies*, Vol. 25, No. 1 (autumn 1995); and David Schenker, *Palestinian Democracy and Governance: An Appraisal of the Legislative Council*, Policy papers no. 51 (Washington: Washington Institute for Near East Policy, 2000).

<sup>49</sup> Examples are Khan et. al., eds, *State Formation in Palestine*, Sara Roy, *The Gaza Strip: The Political Economy of De-Development*, second edition (Washington: Institute for Palestine Studies, 1995); and George Giacaman and Dag Jørund Lønning, eds., *After Oslo: New Realities, Old Problems* (London: PLUTO Press 1998).

<sup>50</sup> Ghanem, *The Palestinian Regime*, 5.

*Politics after the Oslo Accords: Resuming Arab Palestine*, he provides a detailed account of Palestinian legislative affairs with a focus the domestic dimension of Palestinian political development and reform efforts. Brown specifically aims to gain an understanding of Palestinian politics that transcends the conflict with Israel. In exploring the prospects for accountable governance, democracy and the rule of law, he emphasizes the Palestinian past and its links with its regional counterparts.<sup>51</sup> Brown shows how the dialectic relationship between domestic and international affairs affects Palestinian constitutional development. However, *Palestinian Politics after the Oslo Accords* does not cover the 2003 and 2005 amendments, which are central in this thesis. These topics have been dealt with by Brown in a number of recent reports by Brown, and this thesis leans heavily on his work.<sup>52</sup>

Nigel Parsons' *The Politics of the Palestinian Authority: From Oslo to Al-Aqsa*<sup>53</sup> gives an account of the transformation of the PLO from a liberation movement to a national authority. While the Basic Law itself is not a central topic in this work, it provides detailed accounts of decision making procedures within the PA, the PLO and Fatah as well as PA legislation. This forms a crucial background to an understanding of constitutional development in the PA.

A number of recent reports have also provided vital information. Brown has written extensively on the Basic Law and reform efforts in the PA. In a PASSIA publication, Roland Friedrich presents the security laws, which is closely related to the constitutional reform of 2003.<sup>54</sup> A Special Nordem Report by Nils Butenschøn and Kåre Vollan in 2006 gives a thorough presentation of the electoral system in the PA and by extension useful insight into legal and constitutional issues from 1993 to the present.<sup>55</sup>

While of a newer date, this literature does not specifically address the effect of the emergence of Hamas on constitutional development. Brown's reports are a marked exception, but his reports focus on the post-electoral effect of Hamas' political participation. This thesis, however, attempts to show how Hamas' participation and internal troubles in Fatah affected the broader constitutional framework in a process that started prior to the elections.

---

<sup>51</sup> Brown, *Palestinian Politics after the Oslo Accords*, 4-5.

<sup>52</sup> See "The Palestinian Reform Agenda," United States Institute of Peace (USIP), Peaceworks No. 48 (Washington: December 2002). USIP, <http://www.usip.org/pubs/peaceworks/pwks48.pdf> (last accessed 20 January 2008); and "Evaluating Palestinian Reform," Carnegie Endowment Democracy and Rule of Law Program, Carnegie Papers: Middle East Series, No. 59 (Washington: June 2005), <http://www.carnegieendowment.org/files/CP59.brown.FINAL.pdf> (last accessed 20 January 2008).

<sup>53</sup> Nigel Parsons, *The Politics of the Palestinian Authority: From Oslo to al-Aqsa* (New York: Routledge Taylor & Francis Group 2005).

<sup>54</sup> Roland Friedrich, *Security Sector Reform in the Occupied Palestinian Territories* (Jerusalem: Palestinian Academic Society for the Study of International Affairs, 2004).

<sup>55</sup> Nils Butenschøn and Kåre Vollan, "Democracy in Conflict: Report on Elections for Local Councils, President, and Legislative Council in the Occupied Palestinian Territory 2004-2006," Nordem Special Report 2006, Norwegian Centre for Human Rights (Oslo: University of Oslo 2006)

## **Methodological concerns**

My approach to analyze Palestinian constitutional development is a combination of semi-structured interviews and text analysis of constitutional texts. In analyzing the constitutional texts, I try to explain *why* changes were made in the text. This points to underlying agendas that are not explicit in the text. The next question is then *how* this has affected the text. I approached the texts with the basic assumption that the choices were motivated by a blend of normative and partisan considerations. By systematically checking for continuity in the constitutional texts, we can describe the evolution of the Palestinian political system. Divergences between the written constitution and stated goals hint at other motives that might have been controversial or irreconcilable.<sup>56</sup> Brown points out that “discerning the origin of an idea is often an exercise in unearthing archeological layers”.<sup>57</sup> Whereas the Roadmap was imposed on the Palestinians by the Quartet, many of the provisions in it had been borrowed from domestic ideas and documents. These domestic agendas were in turn influenced by various international experts. Here, the focus will not be to trace the sources of ideas, but to pinpoint how these ideas have been transplanted into the various legislative texts. In order to investigate why the Basic Law turned out the way it did, or whether it has been able to affect political outcomes, it is also necessary to go beyond the text. Oral sources can be a useful supplement to written sources. Field interviews with political actors may further contextualize help to place the written material.<sup>58</sup>

## **Fieldwork**

In order to discuss the political context of the constitution, I draw on a compilation of secondary sources: periodicals, reports, news items, periodicals and monographies. In addition, I conducted about 30 semi-structured qualitative interviews in Gaza and Ramallah. Most of the interviews were conducted during a field work specifically made for the purpose of this thesis during the summer of 2005. I also draw on my experience as an observer to the PLC elections in 2006 and previous trips to Palestine. After my last visit in 2006, I have conducted e-mail interviews.

I conducted my field work in July and August 2005, almost two years previous to some of the main events that this thesis aims to explain. At that time, a new election law was being drafted, proposals for further amendments of the Basic Law were being discussed, and Hamas was performing very well in the municipal elections that had been initiated after the death of Arafat in 2004.<sup>59</sup> These topics were often touched upon by my informants, also when I did not specifically

---

<sup>56</sup> Göran Bergström and Kristina Boréus, eds., *Textens mening och makt*, 2nd edition (Lund: Studentlitteratur, 2005), 156-157.

<sup>57</sup> Brown, “Evaluating Palestinian Reform,” 21.

<sup>58</sup> Knut Kjelstadli, *Fortida er ikke hva den en gang var* (Oslo: Universitetsforlaget AS, 1992), 185.

<sup>59</sup> Butenschön and Volla, “Democracy in Conflict,” 119.

ask in advance. As the events of 2006 and 2007 played out, I discovered that this material was also applicable in an analysis of the post-election events. With recordings and transcriptions of the interviews, it was possible to reread the material. As I then had a clear idea of what I was looking for, there is a danger that I was predisposed to interpret the transcripts in a certain way. A skewed approach is, however, a danger to any level of the qualitative field work from the initial formulation of questions and selection of informants to the final analysis. I can only hope that going over the material again with a new focus served to enhance my understanding, rather than narrowing it.

In order to obtain credible information, it is vital that your informants have direct access to the information requested.<sup>60</sup> I had decided to interview politicians from as many factions as possible, preferably on cabinet as well as PLC level in order to ensure informants who had been close to decision making processes. I had also decided to seek informants from within the PLO, and as high up as possible. In addition, I wanted to talk to representatives from the NGO sector, academe and media. The idea was to find out as much as possible about the internal decision making processes and relative power distribution within and between these various sectors.

Interviews with informants tend to introduce new topics of interest.<sup>61</sup> My plan was to conduct qualitative and semi-structured interviews with selective use of an interview guide which would allow me to pose new and potentially more interesting questions. Informants may also provide access information that is not generally known.<sup>62</sup> In verifying such information, I was able to obtain written material that is not readily available, such as legislative proposals and websites that are now offline.

The hospitality and helpfulness of my informants made it possible to interview members of the PLO Revolutionary Council and Executive Committee, the Fatah Central Committee, independent PLC members<sup>63</sup>, Fatah PLC members, representatives of Fida, Fatah, Hamas and Islamic Jihad<sup>64</sup>, former cabinet ministers, employees in the PA bureaucracy, local journalists, academics and representatives from the NGO sector. I was confronted with a variety of perspectives on the ongoing political processes. Views and facts were offered by individuals who

---

<sup>60</sup> Herbert J. Rubin and Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data*, second edition (Thousand Oaks: Sage Publications, 2005), 72.

<sup>61</sup> Kjelstadli, *Fortida er ikke hva den en gang var*, 185.

<sup>62</sup> Kjelstadli, *Fortida er ikke hva den en gang var*, 187.

<sup>63</sup> Prominent individuals that are not (publicly) affiliated with any particular party. For more in the independents, see Ghanem, *The Palestinian Regime*, 49.

<sup>64</sup> Islamic Jihad was formed in the middle of the 1980s. The group promotes armed struggle for the liberation of Palestine and are strongly opposed to the Oslo Agreement and a two state solution. Instead, they favor "one democratic state" for Palestinians and Jews together. Interview, Khalid Batsh, Gaza, 5 July 2005. For more on the establishment of Islamic Jihad, see Mishal and Sela, *The Palestinian Hamas*, 31-37

were either knowledgeable about Palestinian politics, or who had themselves participated in the political process on the executive level in the PA or the PLO, or as lawmakers. The interviews form an indispensable backdrop for my discussion and helped me to place, correct and deepen my understanding of the written texts.

Whenever I discovered that sources had provided me with factual mistakes, this would indicate to me whether a source was credible. In order to “recognize distortions, fabrications, and omissions”,<sup>65</sup> I consciously asked the same specific questions to various sources to see if they would provide me with the same answers. Whenever the informants made conflicting or controversial statements, I asked follow-up questions to confirm their statements or explain apparent inconsistencies. I would also ask other informants to comment so that I had several sources for topics that I was particularly interested in. Transcripts may also be compared to other sources of information, such as documents and news clippings and academic literature. I have worked consciously to check information obtained from my informants against secondary literature and original sources that could be obtained in English.

## **The texts**

As anticipated, the interviews conducted in 2005 did in fact bring about new questions of interest. I became more interested in legal and constitutional reforms as opposed to the informal power structures. The selection of written sources was gradually broadened as my understanding of the topic and knowledge of available data was enhanced. Simultaneously, my focus narrowed. I have looked exclusively at paragraphs relating directly to the relative power distribution in executive-legislative relations, intra-executive relations, and PA-PLO relations. The PLO is included as it represents the higher reference of the PA. How the PLO Executive Committee perceives and plays its role bears directly on what kind of role the successive Palestinian cabinets have been able to play. While the PLO operates beyond and above the Basic Law, the PLO Executive Committee played a key role in determining the rules of competition by choosing the electoral system and offsetting the first Palestinian council. The PLO also provided the early drafts for the Basic Law. The statutes and political culture of the PLO furnish the PA with a body of rules and norms that define the internal parameters for the application and interpretation of the Basic Law during and potentially beyond the Israeli occupation.

Legislative texts are of a normative character and reflect what parties were able to agree on at a given time. Additional sources are needed to tell us to what extent they were implemented. Many laws passed by the PLC were not signed; those that were signed were not implemented; and

---

<sup>65</sup> Rubin and Rubin, *Qualitative Interviewing*, 73.

the presidency and other bodies in the executive moved completely outside the formal legal framework when they wished.<sup>66</sup> An analysis of Palestinian legislative texts will not provide answers to questions like «what is really going on?» or «what is the true address of power?» It certainly will not tell us how politics is conducted in the PA. What it *will* tell us is which constitutional choices have been made during the course of the PA. Whereas motives and deliberations may be hard to check, written changes, omissions and proposals are verifiable.

In some instances, rejected or omitted articles have been more reflective of the way power is really exercised than the texts that were eventually ratified. Omitted clauses regarding the role of the PLO are examples to that. In other instances, rejected proposals were implemented by presidential decree, as was the case with the proposed inclusion of a National Security Council in the Basic Law in 2005. In some instances the texts or amendments of them have contravened either the Oslo Accords or the stated intention of reform drafts, such as the privilege of the president of the PA to appoint diplomats. In cases where implementation diverged from the stated goal, it leads us to a better understanding of the underlying agendas behind the reform proposals.

The 2002 Basic Law (hereafter referred to as “the PLC Basic Law”) was written by the PLC and was the last of a total of nine drafts. I contrast and compare this draft with the third and fourth drafts, which were written by the PLO. The translations of the PLO drafts are provided by the Jerusalem Media and Communications Centre (JMCC), which features a compilation of various historical agreements and documents on their website. The JMCC is a well known and established institution, and I therefore consider the translations found there to be reliable. Ideally, I would have compared the total chain of drafts, but it would have been a daunting task, and these were the only drafts that were publicly available in English. It seems likely that they were no less representative of PLO constitutional thinking than the first and second drafts. The PLC Basic Law is compared and contrasted with the current Basic Law as it was amended in 2003 (hereafter referred to as the Amended Basic Law or the 2003 Basic Law) and the proposed and actual 2005 amendment of the Basic Law.<sup>67</sup> The 2002 Basic Law is drawn from the webpage of Miftah, an NGO run by PLC member Hanan Ashrawi, so I find the translation to be reliable. The translations of the 2003 and 2005 amendments are taken from the webpage of Bir Zeit University’s al-Muqtafi legal database. The various drafts, proposals and amendments vary in ways that reveal the tensions between the different agendas pursued by the drafters as well as their intended audience.

---

<sup>66</sup> Brown, “Evaluating Palestinian Reform,” 8.

<sup>67</sup> The 2005 amendment was only minor and affected only a few paragraphs. It is therefore common to refer to the Amended Basic Law as the version that is currently in force and specifically to the 2005 amendment whenever the distinction is relevant.

**Table 1. Main primary sources**

<b>Name</b>	<b>Status</b>	<b>Access</b>
The PLO 1994 third draft for Basic Law	Not passed	<a href="http://www.jmcc.org/politics/pna/basic2.htm">http://www.jmcc.org/politics/pna/basic2.htm</a>
The PLO 1995 fourth draft for a Basic Law	Not passed	<a href="http://www.jmcc.org/politics/pna/basic1.htm">http://www.jmcc.org/politics/pna/basic1.htm</a>
The PLC Basic Law	Passed by the PLC in 1997, ratified by Arafat in 2002	<a href="http://www.miftah.org/Display.cfm?DocId=790&amp;CategoryId=7">http://www.miftah.org/Display.cfm?DocId=790&amp;CategoryId=7</a>
The Amended Basic Law	Ratified in 2003	<a href="http://muqtafi.birzeit.edu/data/txt/2005/14860.htm">http://muqtafi.birzeit.edu/data/txt/2005/14860.htm</a>
2005 amendment proposals	Rejected	<a href="http://web.archive.org/web/20070608180556/http://www.palestinianbasiclaw.org/2005-proposals">http://web.archive.org/web/20070608180556/http://www.palestinianbasiclaw.org/2005-proposals</a>
The 2005 amendment	Ratified in 2005	<a href="http://muqtafi.birzeit.edu/data/txt/2005/14860.htm">http://muqtafi.birzeit.edu/data/txt/2005/14860.htm</a>

## Translations and usage

Names of government branches and the PA vary in different draft laws, laws, document and agreements. These variations reveal conflicting ambitions on behalf of Israeli and Palestinian as well as the different phases of the Oslo process and how the various branches of the PA came to perceive themselves. For the sake of readability I will, except in cases of direct quotation, refer to the various entities in the following manner: The Palestinian Interim Self-Government has been referred to as the Palestinian Authority (PA), the National Authority and the Palestinian National Authority (PNA). I will refer to it as the Palestinian Authority (PA). The Executive has been referred to as Council of National Authority, Cabinet, Government, or Council of Ministers. I will refer to it as the cabinet. The president has sometimes been referred to with the Arabic term *rais*, a term which will not be used here. The term “council” will here only refer to the Palestinian Legislative Council, the PLC. In the early drafts, the prime minister was been referred to as chief minister, a term which will not be used here.

Names of ministerial portfolios have varied slightly due to shifting cabinet formations. These distinctions are not relevant to my topic and will not be discussed. There is, however, one significant exception concerning the field of foreign affairs, which the PA under Oslo was not supposed to conduct. External affairs were conducted under various portfolios dubbed external affairs, negotiations, planning, international planning and various combinations of the above.

After the 2003 amendment of the Basic Law, the Ministry of Negotiations was transformed into a Ministry of Foreign Affairs, and Nabil Shaath assumed the title of foreign minister. The issue goes beyond semantics. The emergence and role of a Palestinian minister of foreign affairs came to be contested in a way that highlights the gray constitutional area between the PLO and the PA. This will be thoroughly discussed in chapter six.

### ***Thesis outline***

The chapters of this thesis are grouped in three sections. In the first section, chapters two through four deal with the drafting of the Basic Law with a focus on which forces and agendas shaped the final result. In *chapter two*, early PLO drafts are compared to the PLC drafted Basic Law in their quality as legal texts. The nature of the Palestinian political system is outlined with a focus on executive-legislative relations and PA-PLO relations. We see how the Basic Law has been affected by the political context surrounding the drafting process. *Chapter three* focuses on the 2003 constitutional amendment, which converted the Palestinian political system from a presidential to a semi-presidential type of government. The presidency was constitutionally weakened to the advantage of the cabinet and the prime minister. The various agendas that drove the reforms and the related amendment are presented along with the immediate impact of the new premiership. The 2003 amendment is discussed in light of the criteria for significant reforms. *Chapter four* focuses on constitutional development from 2005 to 2006 with emphasis on the development of the presidency and the 2005 amendment of the Basic Law and the new election law in relation to Hamas' decision to participate in elections, and whether developments presents a continuity or a break with the 2003 amendment.

The second section of the thesis relates to the second main question, which is whether the Basic Law has been able to affect political outcomes. The main focus is on the impact of the 2003 amendment, and whether the "empowered reform cabinet" was able to exercise its powers as laid out in the Amended Basic Law. *Chapter five* focuses specifically on the field of security. The 2003 amendment was explicitly aimed at consolidating the security forces under the cabinet. The chapter discusses how the president immediately set out to undermine the reforms, and how perceptions of the usefulness of such a reform changed after the death of President Arafat in 2004. This gives an understanding of whether the reforms were cosmetic or real. *Chapter six* takes on the challenge posed to the cabinet by the PLO, which has also been headed by the PA president. A less known aspect of the 2003 reforms was the effort to establish a Palestinian foreign ministry and to restructure Palestinian diplomacy under the PA cabinet. The formation of a Hamas cabinet in 2006 highlights how deliberate vacillation between PLO and PA legitimacy was not only a



strategy employed by Arafat, but by all parties involved in dealings with the Palestinians. This is relevant to whether or not the cabinet was able to exercise its powers as ascribed in the Amended Basic Law, and whether the reforms were cosmetic or real.

Section III returns to the first main question, which is how political interests have influenced constitutional development. As Fatah was reduced to a minority in the PLC, efforts to influence constitutional development shifted from constitution drafting to constitutional interpretation. *Chapter seven* outlines the process to pass the High Constitutional Court Law that favored the presidency in nominating judges for the Constitutional Court. The drafting process and final amendments made by the president is discussed in light of the gist of the 2002-2003 reforms. Finally, *chapter eight* deals specifically with the constitutional aspects of the intra-executive conflict between President Mahmoud Abbas and Prime Minister Ismail Haniyeh's two successive cabinets and the split between Gaza and the West Bank in the summer of 2007. The various prerogatives claimed by Abbas and Haniyeh are discussed in light of the 2003 amendment.

I will argue that the 2003 amendment was gradually reversed in a process that accelerated with the increasing influence of Hamas. In the immediate aftermath, President Arafat actively sought to undercut it. Prior to the 2006 parliamentary elections, decisions were made that aimed to stem Hamas' performance, and to bolster Fatah and the PA president. This furthered undermined the amendment. After the election victory in 2006, the reversal was complete with the international boycott of the PA cabinet in favor of the presidency.

## PART I: DRAFTING AND AMENDING THE BASIC LAW

*The governing system in Palestine shall be a democratic parliamentary system based on political and party pluralism.*

- Article 5 of the PLC Basic Law

### 2. 1994-1997: The Logic of the Palestinian Basic Law

This part of the thesis concerns how various political interests shaped the Basic Law. Before the Basic Law, the PA institutions were based on signed agreements with Israel, and there was a widespread desire to supplant this basis with Palestinian laws.<sup>68</sup> While the Israelis were hoping that the autonomy project would serve as a safety vault for Palestinian frustrations and solve Israeli security concerns, Palestinians were trying to supersede the limitations of Oslo and create institutions that would survive the Interim period and symbolically herald Palestinian independence. The Basic Law echoes a more ambitious vision of the PA with stronger institutions and references to future statehood than what the Oslo Accords allowed for.

Internally, there were also conflicting visions of the purpose of the Basic Law. PLO chairman and PA President Yasser Arafat and the PLO Executive Committee did not necessarily want to be constricted by a strong and independent elected assembly. The PLC, on the other hand, wanted to create a Basic Law that would “channel permanent arrangements in liberal and democratic directions”.<sup>69</sup> In other words, the PLO drafters wrote with a *nonconstitutionalist* Basic Law with few limitations on the presidency, whereas the PLC sought a *constitutionalist* Basic Law with real limitations on the executive.

Bearing the constitutionalist-nonconstitutionalist dichotomy in mind, I will now compare the 1994 and 1995 PLO drafts of the Basic Law to the PLC drafted Basic Law which was passed by the PLC in 1997. As the drafting process moved on, the PLO gradually lost control of the process to the advantage of the elected PLC. What were the main features of the political system envisioned in the various drafts, and what were the main interests that bore on the texts?

#### ***The Palestinian electoral system***

Before proceeding to define the nature of the Palestinian political system, we must briefly consider the electoral system. Electoral systems are an integral part of the architecture of new constitutions and bear directly on the choice of type of government. They are highly manipulative instruments, and they directly affect the party system and the “spectrum of representation”.<sup>70</sup>

---

<sup>68</sup> Brown, *Constitutions in a Nonconstitutional World*, 138.

<sup>69</sup> Brown, *Palestinian Politics after the Oslo Accords*, 78.

<sup>70</sup> Sartori, *Comparative Constitutional Engineering*, ix.

Broadly speaking, the main choices are between majority based elections and proportional representation.<sup>71</sup> In majority based systems, the candidates need at least 50 percent of the votes to be elected. In proportional systems, parliament seats will be distributed as close as possible to the number of votes cast by the electorate. Generally, proportional elections are associated with parliamentary systems, while majority based elections are associated with presidential forms of government. Comparative studies have showed that while majoritarian elections are likely to produce two-party systems, one-party governments and dominant executives, proportional elections are likely to foster multiparty systems, coalition governments and more equal executive-legislative power relations.<sup>72</sup>

Proportional systems seek to translate the vote into a distribution of seats that reflects the voting distribution, while majoritarian systems seek a clear winner. Whereas in proportional systems, winning is shared, the party gaining a national majority in a majoritarian election will tend to be overrepresented in terms of parliamentary seats.<sup>73</sup> This also makes it hard for smaller parties to obtain representation under majoritarian elections. The debate over proportional versus majoritarian systems concerns the relative importance attached to representativeness of government versus the capacity to govern.<sup>74</sup> I do not aspire to contribute to this debate, and both systems can be seen as equal in their potential for democratic development.<sup>75</sup> The aim here is to examine the correlation between stated objectives and actual choices.

The two most common majority based systems are the so-called “First past the post”, where the candidate with the most votes in a single member constituency wins the election, and the so-called “block vote”, which takes place in multi-member districts where the voters have as many votes as there are seats to be filled.<sup>76</sup> The latter kind of system is the one that was chosen for the first Palestinian electoral law, Elections Law No 13 of 1995. As majoritarian systems are generally known to favor two party systems, the block vote is unusual in multi party elections.<sup>77</sup>

---

<sup>71</sup> Arend Lijphart, “Constitutional Choices for New Democracies,” in, *The Global Resurgence of Democracy*, eds. Larry Diamond and Marc F. Plattner, 2<sup>nd</sup> edition (Baltimore: The Johns Hopkins University Press, 1996), 162-163.

<sup>72</sup> Butenschön and Volla, “Democracy in Conflict,” 10-11.

<sup>73</sup> Sartori, *Comparative Constitutional Engineering*, 3,5; and Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), 143.

<sup>74</sup> Larry Diamond, “Three Paradoxes of Democracy” in *The Global Resurgence of Democracy*, 112; and Lijphart, “Constitutional Choices for New Democracies,” 165-166; and Juan Linz, “The Perils of Presidentialism,” in *The Global Resurgence of Democracy*, 128-131.

<sup>75</sup> Jane Grugel, *Democratization: A Critical Introduction* (Hampshire, Palgrave Macmillan 2002), 76.

<sup>76</sup> Kirsti Samuels and Vanessa Hawkins Wyeth, “State-Building and Constitutional Design after Conflict,” International Peace Academy ( New York: 2006), [http://www.ipacademy.org/asset/file/83/IPA\\_RPT-STATE-BUILDING.pdf](http://www.ipacademy.org/asset/file/83/IPA_RPT-STATE-BUILDING.pdf) (last accessed 25 November 2007), 19; and Lijphart, *Patterns of Democracy*, 165.

<sup>77</sup> Nils Butenschön and Kåre Volla, eds., “Interim Democracy,” Human Rights Report, No. 7 (University of Oslo, May 1996), 29.

Kåre Vollan points out that: “If the party structure is well defined and the voters are loyal to a party, this system will not guarantee a large minority seats in the Council. On the contrary: the largest party would get all their candidates elected if the voters were loyal to their parties.”<sup>78</sup> In the first PLC elections, there was a real chance that hardly any opposition candidate would get elected. The system did, however, give popular individuals a chance to get elected.<sup>79</sup> Hani al-Hassan, member of the Fatah Central Committee and former interior minister, refers to the inclusion of pro Fatah independents as a “tactic to win the public”: “Sometimes you are popular within Fatah, but if you go to elections you don’t win, because you need the support of the community, and the community is based on families and tribes.”<sup>80</sup> The block vote system was chosen in order to deliver a majority for Fatah and pro-Arafat independents. The system favored large notable families and wealthy individuals with a regional power base. Critics claimed that the system was unsuitable in a new democracy that had just emerged from a national crisis, and that it would not motivate the smaller factions to enter the race.<sup>81</sup>

In the first PLC elections, Fatah won 68 out 88 seats. Independent seculars won 12 seats, political Islam-oriented independent candidates won 7 seats, whereas a small secular party managed to secure 1 seat.<sup>82</sup> According to Butenschøn and Vollan, Fatah could have taken almost all the seats if they had wanted, but they allowed Fatah candidates to run as independents rather than official Fatah candidates so as to avoid seeming to organize “a pure Fatah election”.<sup>83</sup> One of the reasons given for the choice of this kind of system was that it would ensure a stable ruling majority in the council.<sup>84</sup> The Basic Law’s stated goal of pluralism was not met as a result of electoral representation. Rather, pluralism was dispensed by the president as he co-opted parts of the opposition into positions in the cabinet or bureaucracy as a way of maintaining pluralism while at the same time neutralizing the opposition.<sup>85</sup>

---

<sup>78</sup> Butenschøn and Vollan, eds., “Interim Democracy,” 29.

<sup>79</sup> Butenschøn and Vollan, eds., “Interim Democracy,” 31.

<sup>80</sup> Hani al-Hassan, interview, Ramallah, 19 July 2005.

<sup>81</sup> Parsons, *The Politics of the Palestinian Authority*, 190-191. See Shikaki, “The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine”, 18-19 for more on the internal debate at the time.

<sup>82</sup> Jamil Hilal, “The Effect of the Oslo Agreement on the Palestinian Political System,” in *After Oslo*, 131. Ziad Abu Amr lists the composition of the first PLC as one of several reasons why the PLC was unable to play a central role. See Ziad Abu Amr, “The Palestinian Legislative Council: A Critical Assessment,” *Journal of Palestine Studies*, Vol. 26, No. 4 (Summer, 1997), 95.

<sup>83</sup> Butenschøn and Vollan, “Democracy in Conflict,” 60-61.

<sup>84</sup> Butenschøn and Vollan, “Democracy in Conflict,” 32.

<sup>85</sup> Ghanem, *The Palestinian Regime*, 131. Looking at cabinet formation under Arafat, we find that the number of appointed ministers was consistently above the 20 percent ceiling set by Oslo, and that the majority of appointed ministers were non-Fatah. 1996: 10 out of 25 ministers. Eight of these were non-Fatah. 1998: Eight out of 31 ministers. Of these, seven were non-Fatah. June-Oct 2002: Eight out of 21 ministers. Six of these were non-Fatah. Oct 2002-Apr 2003: Eight out of 20 ministers. Five of these were Non-Fatah. (All numbers excluding Arafat himself.) This is based on a survey of Palestinian cabinet composition compiled for the

## ***The Palestinian system of government***

I will argue that the Palestinian political system was presidential until 2003, when an amendment to the Basic Law turned it into a semi-presidential system. It is also possible to argue that the 2003 amendment turned the PA from a semi-presidential into a parliamentary rule.<sup>86</sup> The viability of the concept of semi-presidentialism is contested. Robert Elgie criticizes Sartori's definition because it refers to relational properties and thereby introduces an element of subjectivity into the classification process.<sup>87</sup> Alan Siaroff argues that the concept of semi-presidentialism is superfluous, and offers a set of criteria to measure the relative powers of the president vis-à-vis parliament, rather than vis-à-vis the cabinet.<sup>88</sup>

Definition matters because it determines classing, which in turn determines what conclusions can be drawn about the performance of a certain kind of regime.<sup>89</sup> The goal here is neither to add to the body of conclusions as to semi-presidential systems, nor to contribute to the discussion of whether semi-presidentialism is a valid category. The aim is to broaden our understanding of Palestinian constitutional history. I have chosen to apply the definitions offered by Sartori, as they to my opinion provide the most useful tool for discussing the various components of executive-legislative relations in the PA. By that particular set of definitions, the PA has evolved from a purely presidential to a semi-presidential system.

The Basic Law explicitly states that the PA is to be a parliamentary system. However, the distribution of authorities within the PA does not confer to that of a parliamentary system. "Parliamentarism" refers to several variants of executive-legislative arrangements. The lowest common denominator for all these forms is the presence of *power sharing*, as opposed to the *separation of powers* that characterizes presidential systems. Separation of power requires that the executive is separated from parliamentary support, whereas power sharing means that the executive is dependent on parliamentary support in order to govern.<sup>90</sup> Whereas a parliament-created government "is, at least in intent and origin, a part of parliament," a "president-created

---

purpose of this thesis. I have cross checked lists of cabinet members published on various PA websites with a similar compilation provided in Parsons, *Politics in the Palestinian Authority* and fed them into an Excel sheet. There were, however, slight inconsistencies in the material that I found as to the total number of portfolios and ministers without portfolios.

<sup>86</sup> Butenschön and Vollan, "Democracy in Conflict," 26.

<sup>87</sup> Robert Elgie, "Semi Presidentialism: Concepts, Consequences and Contesting Explanations," *Political studies Review*, Vol. 2, No. 3 (September 2004), 317.

<sup>88</sup> Alan Siaroff, "Comparative presidencies: The inadequacy of the presidential, semi-presidential and parliamentary distinction," *European Journal of Political Research*. Vol. 42, No. 3 (May 2003), 307.

<sup>89</sup> Elgie, "Semi-Presidentialism," 317.

<sup>90</sup> Sartori, *Comparative Constitutional Engineering*, 86.

government is its counterpart”.<sup>91</sup> For a system to be called parliamentary, it requires the presence of a prime minister to head the cabinet.

Sartori defines three sets of criteria for a political system to be defined as presidential. In a presidential system, the president must be elected in a direct and popular election for a fixed term, the president cannot be discharged by a parliamentary vote, and the president directs the governments that he or she nominates and appoints. “When these three conditions are jointly met, then we doubtlessly have a pure presidential system – or so says my definition.”<sup>92</sup> Under the PLC Basic Law, the president is directly elected for the interim period, the president cannot be discharged by the PLC, and the president appoints and directs the cabinet. Consequently, the PLC Basic Law will here be seen as providing for a presidential system. Although the early PLO drafts for a Basic Law did provide for a prime minister, the PLO drafts will also be seen as introducing presidentialism. The argument will be elaborated on below.

According to Sartori, the one defining and necessary requirement for semi-presidentialism to exist is that the president must share power with a prime minister, who in turn must obtain continuous support from parliament. The semi-presidential system must have a dual authority structure and establish a diarchy between a president who is head of state, and a prime minister who heads the government.<sup>93</sup> Sartori stipulates that a system is semi-presidential when the following characteristics jointly apply: 1) the head of state (president) is elected by a popular vote for a fixed term of office, 2) the head of state shares the executive power with a prime minister, 3) the president is independent from parliament, but is not entitled to govern alone and directly, 4) the prime minister and his cabinet are president-independent in that they are parliamentary-dependent: they are subject to either parliamentary confidence or no confidence, and they need the support of a parliamentary majority, 5) the dual authority structure of semi-presidentialism allows for different balances of power within the executive, provided that the ‘autonomy potential’ of each component unit of the executive subsists.<sup>94</sup> According to the criteria above, the 2003 amendment of the Basic Law will here be seen as introducing a semi-presidential system in the PA by creating a prime minister. The role of the prime minister will be further elaborated in chapter three.

---

<sup>91</sup> Sartori, *Comparative Constitutional Engineering*, 164.

<sup>92</sup> Sartori, *Comparative Constitutional Engineering*, 84.

<sup>93</sup> Sartori, *Comparative Constitutional Engineering*, 121-122.

<sup>94</sup> Sartori, *Comparative Constitutional Engineering*, 131-132.

## ***The PLO drafts: Nonconstitutional presidentialism***

The PLO drafts discussed below are the third and fourth drafts, dated 1 May 1994 and 11 December 1995. There are two interesting features to the drafts. The first is how the drafters envisioned the linkage between the PLO and the PA, which would have served to entrench the role of the PLO elite and provide the president with multiple sources of authority. The second is the role of the chief minister (hereafter prime minister), which hinted at a dual power structure within the executive. I will now describe what kind of political system was envisioned in the drafts and discuss to what extent they would have limited executive power.

Both PLO drafts state that the Basic Law “shall not affect the powers and duties of the Palestine Liberation Organization and its organs including its powers to represent the Palestinian people in foreign and international relations and relations with foreign governments and international organizations” (Art 103, 1994 PLO draft; Art 117, 1995 PLO draft). This article places the PLO beyond the oversight of the PLC, which is due to the limited representativity of the PA as opposed to the PLO. However, it also provided President Arafat with a source of authority whereby he could legitimately act above the limitations of a constitutional framework.

Critics at the time argued that the 1994 draft would impose the old order on the new political regime and embed the PLO, its chairman and the PLO bureaucracy in the new system.<sup>95</sup> In response to this criticism, several disputed paragraphs were removed in the 1995 draft. The omitted paragraphs are noteworthy because in spite of their disappearance, they are more reflective of the way politics was in fact conducted than were later drafts. The 1994 draft establishes the PLO Executive Committee as a “reference authority” to the council (Art 58). Especially interesting is Article 50, which states that:

The Chairman of the Executive Committee of the PLO shall be the President and the head of the National Authority and shall exercise the powers prescribed for him in the Basic Laws of the PLO, the resolutions of the Palestine National Council, the Central Council of the PLO and the Executive Committee of the PLO as well as the powers prescribed in the Basic Law.

While the provision is not to be found in later drafts, this was in fact how Arafat came to exercise his power. Arafat had a dual position as PA and PLO leader, and he consistently refused to make clear in which capacity he was acting on particular measures.<sup>96</sup> On the level of principles, the implications of Art 50 were of a different nature. While allowing the president to consciously draw on the legitimacy of the PLO in actions only pertaining to Palestinians living within PA

---

<sup>95</sup> David Hoffman, “Palestinian Self Rule Charter Draws Fire,” *Washington Post*, 19 February 1994; and Aruri, “A New Palestinian Charter.”

<sup>96</sup> Brown, *Palestinian Politics after the Oslo Accords*, 49-50; and Jamil Hilal and Mushtaq Husain Khan, “State formation under the PNA: Potential outcomes and their viability,” in *State formation in Palestine*, eds. Khan et. al., 86.

jurisdiction, it also placed the PA within the broader context of liberation and independence. The 1994 draft of the Basic Law aimed at confirming the PLO's role as a larger political entity representing millions of refugees that remained outside of PA jurisdiction. The PLO firmly positioned itself as a political player with powers beyond the limited authorities vested in the PA.

Art 63 of the 1994 draft states that ministers would also answer directly to the Executive Committee, and not to the president or the prime minister (Art 63, 1994 PLO draft). This setup would leave the prime minister with ministers that he cannot fire, and that he does not appoint. Moreover, while the prime minister has the authority to convene council meetings, so does the president (Art 68, 1994 PLO draft). Cabinet meetings are to be presided over by the president if he is present, and if not, by the prime minister (Art 68, 1994 PLO draft). Art 64 does state that the prime minister is to direct the work of the council, but in light of the actual authorities awarded to the prime minister, he cannot be considered as "really in charge".<sup>97</sup> In the 1995 draft, these tasks are not referred to at all. The prime minister is awarded the authority to deputize for the president in the opening of parliamentary sessions (Art 53, 1995 PLO draft). He neither appoints nor dismisses ministers, but may propose a motion of no confidence in the cabinet before the council (Art 84, 1995 PLO draft). The president, not the prime minister, is to open each session of the council and lay out the program of "his government" (Art 53, 1995 PLO draft). The president appoints the cabinet, although approval must be obtained by the council (Art 78.2, 1995 PLO draft).

Art 78.3 mirrors Art V.4.c from the Interim Agreement, stating that the president may appoint a number of nonmembers of the elected council as ministers not exceeding 20 percent. Unelected ministers would owe their position to the president, and not to the electorate. The prime minister and the cabinet are here jointly and individually responsible to the president and the council (Art 83, 1995 PLO draft). The president serves for a fixed term (Art 52, PLO draft; Art 70, 1995 PLO draft). He is commander in chief of the Palestinian forces (Art 54, 1994 PLO draft; and Art 72, 1995 PLO draft), and exercises his power through resolutions and decrees (Art 57, 1994 PLO draft, Art 75, 1995 PLO draft). The president's legislative power is spelled out in further detail in the 1995 draft: "The President has the power to initiate or propose laws to the council or issue secondary legislation, including Orders and Regulations if authorised to do so by the primary law" (Art 73.2, 1995 PLO draft). In conclusion, the role of the prime minister was weakened from the 1994 to the 1995 drafts. Conversely, the role of the president became stronger and more defined.

---

<sup>97</sup> Sartori, *Comparative Constitutional Engineering*, 103.



Juan Linz has stated that “parliamentary systems may include presidents who are elected by direct popular vote, but they usually lack the ability to compete seriously for power with the prime minister”.<sup>98</sup> In this case the prime minister would not be in a position to compete with the president. This position was in fact progressively weakened throughout the drafting process, and neither of the PLO drafts can be seen as introducing a dual power structure. We have here a directly elected president who sits for a fixed term (the interim period), and who for all practical purposes leads the government that is nominated and appointed by the PLO Executive Committee, who in this case is also the president. Hence, two of Sartori’s three criteria for a purely presidential system are met.

I will now outline the requirements for parliamentary oversight and limitations on the executive in the PLO drafts, which relate to Sartori’s third criteria of parliamentary support. Semi-presidentialism would require the presence of a prime minister, but it would also require that the prime minister depends on continuous support from parliament.<sup>99</sup> In the case of the 1994 draft, there is a prime minister post, but no requirement of parliamentary support. In the 1995 draft, Art 60.6 and 60.7 states that the council is to approve the appointment of cabinet ministers and withdraw confidence in the cabinet or individual ministers. At least 10 members of the council may propose a vote of confidence in the cabinet, and a simple majority would require the presentation of the cabinet or minister’s resignation to the president (Art 84). Art 77 states that the president has the power to accept resignations, but he may not be required to do so. While Art 60.6 states that the council is to approve the appointment of ministers, there are no provisions specifying how or when such approval is to be obtained, or what would happen if confidence was not granted. Art 60 states that the council is to approve laws, debate the policy of the cabinet, and approve the budget. The council is not awarded a central place in lawmaking, but is consigned to proposing “the enactment of laws” (Art 59) or rubber stamping laws that are proposed by the ministers (Art 87.4) and the president (Art 73.2).

Both drafts refer to the existence of an audit office, a judicial authority with a supreme court, a chief justice, and an attorney-general. Nomination, appointment and endorsement procedures are not referred to, leaving an obstruction free zone for the president to use such appointments for patronage (Art 91, 94, 96 and 101 in the 1994 PLO draft; and Art 105, 108-109, 110 and 115-116 in the 1995 PLO draft).

The PLO drafts provided for an elected assembly and allowed for a dual power structure by the introduction of a prime minister. At first glance, it might seem that the PLO drafts provide

---

<sup>98</sup> Linz, “The Perils of Presidentialism,” 125.

<sup>99</sup> Sartori, *Comparative Constitutional Engineering*, 121.

for a semi-presidential kind of system. However, Sartori has argued that political systems “hang together ... on account of a system logic of their own: “Thus, before reassigning presidentialism to another class – whether semi-presidentialism, near-parliamentarism, and the like – we must check whether a given variance violates that logic or not.”<sup>100</sup> As argued above, the PLO drafts provided for a weak elected council with diffuse legislative powers, undefined procedures for the granting of confidence to the cabinet, which cannot question the president, and with no clearly defined role in accepting appointments for key positions in the judiciary or other public councils and institutions. While the council’s role was enhanced from the third to the fourth draft, the prime minister was correspondingly weakened. Even while it could be argued that the presence of a dual power structure would allow for a semi-presidential system, the underlying system logic is purely presidential. Furthermore the drafts did not enable the parliament to efficiently control the executive. By enabling the president while leaving the PLC and the prime minister with a vague and limited role, the PLO drafts would have provided for a nonconstitutionalist presidency.

### ***The PLC Basic Law: Constitutional presidentialism***

With the PLC elections in 1996, a new power center was established in the Palestinian political system. By discarding the PLO drafts, the PLC gave itself the opportunity to strive towards a stronger role within the PA. The PLC’s Basic Law differs markedly from the PLO drafts in several ways. The Palestinian leadership realized the symbolic value of having a constitution, but they were reluctant to be constrained by formalities during an existential struggle. In contrast, Palestinian constitutionalists wanted a constitution that would impose real limitations on executive power, seeking to establish a normal political life in which not all matters were subordinate to the national struggle. They feared that postponing a real institutionalization of power would establish deep seated practices that would be detrimental to a future Palestinian liberal democracy.<sup>101</sup> The Basic Law as it was passed by the PLC in 1997 provided for a strong presidency, but was more dominated by constitutionalism than had been the early PLO drafts.

The main differences between the PLO and the PLC drafts lie in the near total absence of the PLO in the PLC draft, the total absence of the prime minister, and the considerably more detailed role awarded to the council. Whereas the PLO drafts had formalized the PLO as an important point of reference for the PA, the PLC Basic Law only mentions the PLO in Art 8, stating that “The flag of Palestine shall be in four colors and in accordance with the dimensions and measurements approved by the Palestine Liberation Organization.” In reality, Arafat imposed

---

<sup>100</sup> Sartori, *Comparative Constitutional Engineering*, 85.

<sup>101</sup> Brown, *Palestinian Politics after the Oslo Accords*, 93.

the PLO Executive Committee on the PLC and the cabinet respectively. This he did by demanding that Executive Committee members be awarded speaking rights in council sessions.<sup>102</sup> He also refused to meet the cabinet alone, but insisted on conducting joint leadership meetings with the cabinet and the Executive Committee.<sup>103</sup> This weakened the cabinet as an institution, even though individual ministers wielded considerable personal power as part of the core leadership.<sup>104</sup>

I will now briefly outline the presidential role as designed by the PLC, before I proceed to present the role of the council. Art 68 states that “Ministers are responsible to the President of the National Authority” and the Cabinet “is jointly responsible before the Legislative Council”. Art 62 authorizes the president to appoint and remove ministers and to preside over cabinet meetings. In removing the prime minister, these articles provide for a purely presidential regime, in which the president appoints and leads the cabinet. The president retains his rights to initiate and propose laws to the council (Art 58). Art 57.2 gives the president the opportunity to return a law to parliament with objections, in which case it would require a two thirds majority to pass the legislation.

As for decisions and orders, Art 60 states that the president “shall have the right in exceptional cases, which cannot be postponed, and while the Legislative Council is not in session, to issue decisions and decrees that have the power of law”. In such cases, the decisions issued must be presented to the PLC in the first session convened after the issuance of the decision. If the PLC refuses to approve the decisions, “they shall cease to have the power of law” (Art 60). This clause was designed to minimize the president’s ability to act independently from the PLC in creating legislation. The intention was to prevent the president from marginalizing the PLC by creating legislative facts on the ground under a state of emergency.<sup>105</sup>

The PLC Basic Law introduces emergency provisions, which had not been provided for in the PLO drafts. Presidents are generally awarded more extensive emergency powers than prime ministers in parliamentary systems.<sup>106</sup> The Palestinian emergency provisions are, however, fairly strict. The president may declare a state of emergency by a decree when there is a threat to national security caused by war, invasion, armed insurrection, or a time of natural disaster for a period not to exceed thirty days (Art 101.1). The president needs an approval of two thirds of the legislative council in order to extend the state of emergency (Art 101.2). The decree must state the

---

<sup>102</sup> Brown, *Palestinian Politics after the Oslo Accords*, 99.

<sup>103</sup> Azmeh Shueibeh and Khalil Shikaki, “A Window on the Workings of the PA: An Inside View, *Journal of Palestine Studies*, Vol.. 30, No. 1 (Autumn, 2000), 92.

<sup>104</sup> Rubin, *The Transformation of Palestinian Politics*, 16.

<sup>105</sup> Brown, *Palestinian Politics after the Oslo Accords*, 75-76.

<sup>106</sup> Sartori, *Comparative Constitutional Engineering*, 164.

purpose of the state of emergency and define what territories it applies to (Art 101.3). The PLC is authorized to review all or some of the procedures implemented during the state of emergency (Art 101.4). States of emergency have been used to shut down parliaments indefinitely.<sup>107</sup> In order to prevent such misuse of emergency provisions, Art 104 states that the PLC cannot be dissolved or suspended during states of emergency.

The legislative authority is dealt with in chapter three of the Basic Law. Art 43 elaborates on the requirements for parliamentary support. Whereas the 1995 draft Art 60.6 had stated that the council was to approve the appointment of cabinet ministers, it did not specify how confidence was to be obtained, or what would happen if ministers were not approved. In the PLC Basic Law, such procedures are defined. The Basic Law requires the president to present the cabinet to the legislative council “in the first session for a vote of confidence, after listening to a Ministerial statement that defines the Governments policy and program” (Art 64.1). The affirmative vote of confidence requires an “absolute majority of the Council” (Art 64.2).<sup>108</sup> If confidence is not achieved, the president must then find a new ministerial candidate to be presented for a new vote in the PLC (Art 64.2-3). Sub clause 4 explicitly states that “No Minister shall assume the duties of his position before obtaining the confidence of the Legislative Council.” In addition to requiring parliamentary support, the PLC Basic Law specified what would happen if such confidence was not granted. This aimed to ensure that parliamentary confidence would in fact be sought, and to prevent the president from stalling the process. The 1995 PLO drafts had given PLC members the right to question the government or individual ministers (Art 59). Also in this instance, the PLC Basic Law is considerably more detailed, stating that council members have the right to:

Address inquiries and interrogatories to the Government or to any Minister, or alike. Interrogatories shall be discussed only seven days after submission, unless the addressee agrees to reply promptly or within a shorter notice. However, this period can be curtailed to three days in case of urgency as per the approval of the President of the National Authority (Art 43.2).

After an interrogation, ten members may propose a vote of no confidence (Art 44.1). A council majority “shall result in terminating the term of the party in whom confidence was lost (Art 44.2). The intention would be to prevent ministers from stalling requests from the PLC, and to provide the PLC with more efficient tools to hold ministers accountable.

---

<sup>107</sup> Nathan J. Brown, “Regimes Reinventing Themselves: Constitutional Development in the Arab World,” *International Sociology*, 2003 Vol 18, no 1 (March 2003), 40.

<sup>108</sup> Standing Orders for the Palestinian Legislative Council, Non Official translation by ARD, PLC Project. USAID, [http://www.usaid.gov/wbg/misc/standing\\_orders\\_revised\\_2.pdf](http://www.usaid.gov/wbg/misc/standing_orders_revised_2.pdf) (last accessed 19 January 2008). The PLC standing orders art 1 provides the following definitions of majority in the council: Absolute Majority: 50% + 1 of the number of PLC members present when voting is made, Council Absolute Majority: 50% + 1 of all PLC members, Relative Majority: Majority of voters regardless of the number of members present, Two-thirds majority: Majority of at least two-thirds of PLC members.

While the 1995 PLO draft had stated that council members “may propose the enactment of laws” (Art 59), the PLC Basic Law states that council members have the “right to propose laws” (Art 43.1). Article 57 referring to the promulgation of laws by the president as considerably more detailed. In addition to requiring the president to promulgate laws after approval by the council, the president is obligated to return the laws to the council with comments and objections. If the president declines to either promulgate or return the law to the council within the specified time limit, the law shall be considered approved. If returned to the council, the council must debate it again and pass it with a two thirds majority (Art 57.1-2). In other words, the PLC Basic Law did not just state that the president could return laws to the PLC, but also stipulated procedures for what would happen next. This aimed to ensure the PLC a more defined role in the legislative process.

The PLC Basic Law strengthened the role of the PLC in several ways, i.e. by introducing a role for the PLC in endorsing appointments for the Attorney General (Art 98), the Governor of the Monetary Authority (Art 84.2) and Chief of the Financial and Administrative Bureau (Art 87). As was the case in the PLO drafts, the PLC is to be presented with the budget at least two months before the beginning of the financial year (Art 61, 1995 PLO draft; Art 48, PLC Basic Law). The 1995 PLO draft had stated that the budget cannot be operative unless it is approved by the council. However, there were no specified procedures as to how objections from the council should be handled, except that “spending shall continue on the basis of monthly allocations of one twelfth of the previous budget for each month” (Art 103, 1995 PLO draft). The PLC Basic Law, however, states that if the budget is not ratified prior to the start of the new fiscal year, it should be sent back to the government within a month. (Art 48.2). “The returned budget shall include the Council’s comments, in order to complete the necessary requirements and return it to the Council for approval.” We see that the role of the elected council was enhanced, and the procedures regulating role in oversight became more detailed. On the other hand, it remained impossible to impeach or even question the president. According to Abdul Jawad Saleh, independent member of the first PLC member and former Minister of Agriculture (1996-1998), he proposed to include the possibility of impeachment in the Basic Law, but “nobody even bothered to discuss it”.<sup>109</sup>

The PLC Basic Law does not provide for a dual power structure within the executive. The president is directly elected for a fixed term and cannot be discharged by a parliamentary vote, nor can he be questioned by parliament. The president appoints the cabinet and heads its operations. It is clear that by Sartori’s definition we are dealing with a purely presidential system. We are also

---

<sup>109</sup> Abdul Jawad Saleh, interview, Ramallah, 23 July, 2005.

dealing with a system that would have imposed real limitations on the presidency, albeit with a strong presidential role.

### ***Paradoxes in Palestinian constitutional design***

Kirsti Samuels has pointed out that constitutions need to result from participatory process rather than processes whereby “the spoils” are divided between the political elites.<sup>110</sup> A study by the International Institute for Democracy and Electoral Assistance (IDEA) on twelve cases of transitional constitution building indicates that the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms.<sup>111</sup> On the other hand, “processes dominated by one interest or faction tended to result in constitutions favoring that interest or consolidating power in the hands of certain groups”.<sup>112</sup> The differences between the PLC drafts and the PLC Basic Law seem to confirm Samuels’ observation, that participatory processes provide for stronger accountability mechanisms, where as processes dominated by one party tend to entrench the interests of that party. The Basic Law drafting process started out as an exclusive and PLO dominated process, but the PLO did not manage to maintain its hegemony over the drafting process. The PLO drafts provided for a nonconstitutionalist presidential regime which aimed to enable the president, while the PLC drafts provided for a constitutionalist presidential regime with real limitations on presidential power.<sup>113</sup>

I have stated that both presidential and parliamentary systems will here be regarded as equal in their potential for democracy. However, if the PA was to evolve in the direction of parliamentarism, different choices would have had to be made. Neither draft provided for parliamentarism, in spite that all Palestinian constitutional drafts have laid claim to a parliamentary system based on party pluralism. In addition, the electoral system chosen was a majority system, which is usually considered favorable to presidential regimes and two party states. How might these inconsistencies be explained?

Donald Horowitz has argued that constitutional drafters generally act on “inchoate and partially worked-out ideas”. In addition to the contest of explicitly stated theories regarding the

---

<sup>110</sup> Samuels and Wyeth, “State-Building and Constitutional Design After Conflict,” 6.

<sup>111</sup> Kirsti Samuels, “Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies,” second draft (Stockholm: 2006). IDEA (International Democracy Building & Conflict Management), <http://www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf> (last accessed 25 November 2007), 24-25.

<sup>112</sup> Samuels and Wyeth, “State-Building and Constitutional Design After Conflict,” 6-7.

<sup>113</sup> Rubin, *The Transformation of Palestinian Politics*, 39.

virtues and nonvirtues of types of political and electoral systems, there are “more influential, implicit theories espoused by their practitioners”. Horowitz further contends that “of now we lack a theory of their theories”.<sup>114</sup> A few general observations might still be made. Jane Grugel has pointed out that in the debate over the relative merits of presidentialism versus parliamentarism, the case for parliamentary systems in nascent democracies is strengthened by the fact that the successful Southern European countries are parliamentary democracies, while post-Communist systems feature mixed systems, and the more “problematic” Latin American and African cases generally have presidential systems.<sup>115</sup> There is no consensus in this debate. From the resulting texts, however, it seems reasonable to deduct that while the Palestinian leadership sought the legitimacy that is associated with a parliamentary democracy, they also sought the government capacity that is associated with a presidential form of government.

In light of Grugel’s observation, it would have been politically very difficult for the PA as well as the international community to explicitly state that they aimed to build a strong presidency with maximum flexibility for the leadership to take unpopular decisions. Marina Muskhelishvili has pointed out that politicians need to “validate his/her power publicly by certain public interest values”, and that “in the public domain, politicians cannot justify their own action by using conflicting arguments. She argues that politicians will generally aim to strengthen their own power and enhance their authority, but that these motives are not suited to secure public legitimacy for a course of action.”<sup>116</sup>

Finally, the issue is not really whether or why the PA evolved in the direction of presidentialism or parliamentarism respectively, but to what degree it would have to be authoritarian in order to pursue its various tasks. Mushtaq Husain Khan has argued that “executive centralization was a design feature of the quasi-state created under Oslo, and was required to ensure the security-first conditions that Israel insisted on”.<sup>117</sup> The security drive was further reinforced after the 11 September 2001 terror attacks, and the 2002-2003 reform drive was very much a part of a new democracy imperative that has been driven by Western security concerns.<sup>118</sup> It was perceived as necessary to ensure that the Palestinian leadership would be able to prevent

---

<sup>114</sup> Horowitz, “Constitutional Design,” 19.

<sup>115</sup> Grugel, *Democratization*, 75.

<sup>116</sup> Marina Mushkelishvili, “Constitutional Changes in Georgia” (paper presented at “Constitutional/Political Reform Process in Georgia, Armenia and Azerbaijan: Political Elite and Voices of the People” in Tblisi in Georgia, 18-19 March 2005). International IDEA Democracy Building & Conflict Management, [http://www.idea.int/europe\\_cis/upload/Constitutional%20Changes%20in%20Georgia%20-%20eng%20changed-2.pdf](http://www.idea.int/europe_cis/upload/Constitutional%20Changes%20in%20Georgia%20-%20eng%20changed-2.pdf) (last accessed 25 November 2007), 52.

<sup>117</sup> Mushtaq Husain Khan, Introduction to *State formation in Palestine*, eds. Khan et. al., 8-9; and Hilal and Khan, “State formation under the PNA,” 84.

<sup>118</sup> Carothers and Ottaway, “The New Democracy Imperative,” 3-4.

the opponents of the Oslo Accords from achieving their political goals. The Oslo Accords effectively closed the formal political space for anyone who rejected Oslo and required a political system that provided room for cooptation as well as exclusion of the opposition. In the words of Nigel Parsons:

Reinforcing the capacity to co-opt, both the PA and Israel continued to coerce: by late 1996 an estimated 1,200 Palestinians had been jailed by the PA, with 7 tortured to death, and a further 6,000 imprisoned by Israel, which retained the right to arrest and detain ‘suspects’ in those areas in which it retained security control (areas B and C). Indicative of realities on the ground, of those Palestinians then in Israeli jails, some 3,000 had been arrested after the signing of the DoP [Declaration of Principles].<sup>119</sup>

The Palestinian leadership sought to bolster their own personal power within the territories by their allegiance to Arafat. Their interests converged with the interests of the international community, who also sought to bolster Arafat. The overlap of interests was embodied in the nonconstitutionalist spirit of the PLO drafts of the Basic Law. In the end, these interests impacted on the Basic Law primarily by making it possible to ignore it.<sup>120</sup> Until the second Intifada erupted, Arafat received no perceivable signals from the international community that his ruling without any constitutional limitations was unacceptable.

As the PLO/PA leadership lost control over the drafting process, they also lost interest in the document itself, and the PLC found that it was helpless in forcing Arafat to actually promulgate the Basic Law. In fact, Arafat argued that while the PLC was mandated to “discuss” a constitution, but not to actually “draft one”.<sup>121</sup> Even though the PLC drafted a constitutionalist Basic Law, the constitutional limitations imposed on the executive did not serve to diminish authoritarianism. Instead, instead, authoritarianism “simply moved outside legal channels”.<sup>122</sup> The PLC did threaten to suspend its own work or bring down the government over a list of issues including the Basic Law in 1997 and 1998, but in the end, they chose to leave the matter be and focus on making an impact in other areas.<sup>123</sup> Only in 2002, as the reform coalition received massive support from abroad, was the Basic Law ratified by President Arafat as part of a broader reform effort. Just a few months after its promulgation in 2002, the Basic Law was amended to provide for a semi-presidential system. This reconfigured the Palestinian political scene and shifted the axis of conflict from president-parliament conflict to conflicts between the president and prime minister, which presided over a weak and technocratic cabinet. This reform is the topic of the next chapter.

---

<sup>119</sup> Parsons, *The Politics of the Palestinian Authority*, 46.

<sup>120</sup> Brown, *Palestinian Politics after the Oslo Accords*, 86.

<sup>121</sup> Rubin, *The Transformation of Palestinian Politics*, 36.

<sup>122</sup> Brown, “Requiem for Palestinian Reform,” 6.

<sup>123</sup> Brown, *Palestinian Politics after the Oslo Accords*, 78.



*When Bush made his great speech, he said that the Palestinians need a constitution, probably to remove some power from Arafat. But they did that through an amendment of the Basic Law, so now the Americans are not talking about a constitution anymore.*

- Mudar Qassis

### **3. The 2003 amendment: De-Arafatizing Palestinian politics**

The years from 1997 until 2002 years were marked by increased Palestinian frustration over the lack of progress towards Palestinian independence and disappointment over the widespread corruption and inefficiency within the PA. In 1999, the so-called transitional period expired, without the establishment of an independent Palestinian state. The mandate for the PLC expired with the transitional period, and the PA continued to function in a constitutional limbo. In September 2000, the so-called al-Aqsa Intifada, broke out in the Palestinian territories. For the next 20 months, armed Palestinian resistance and Israeli military operations culminated in Israel's Operation Defensive Shield in March-April 2002. The initial Israeli response to the uprising had primarily been to target Palestinian security installations and infrastructure hinting at future sovereignty, such as the airport in Gaza. With Operation Defensive Shield, all major West Bank towns, except Heron and Jericho, were invaded and reoccupied. This offensive also targeted the PA's civilian infrastructure, such as the PLC offices and various PA departments. President Yasser Arafat was twice put under siege in his headquarters in Ramallah, first in March-April, and then again in September. The events would trigger a variety of responses, with demands for reform as the lowest common denominator.<sup>124</sup>

Outside the PA, doubts arose as to the intention and capacity of Arafat to quell violence and reign in the armed factions. Israel reached the conclusion that Arafat was no longer a "partner for peace". Israeli Prime Minister Ariel Sharon referred to him as "irrelevant", and even threatened to assassinate him. The international community, which had formerly depended on Arafat to "sell" Oslo to the Palestinians, came to regard Arafat as an obstacle to peace. Domestically, an existing Palestinian reform camp, frustrated over the perceived mismanagement by PA, had been unable to impose their vision of accountability on the Palestinian leadership. Their arguments gained new impetus by the PA's failure to provide for basic needs and services to the population under the Israeli military offensive. In addition, the Palestinian security forces were neither able to repress the uprising, nor to engage decisively in fighting the occupation.<sup>125</sup>

---

<sup>124</sup> Rema Hammami, "Interregnum: Palestine After Operation Defensive Shield," in *Middle East Report*, No. 223 (Summer 2002). Middle East Report Online, [http://www.merip.org/mer/mer223/223\\_hammami.html](http://www.merip.org/mer/mer223/223_hammami.html) (last accessed 23 November 2007).

<sup>125</sup> Parsons, *The Politics of the Palestinian Authority*, 166.

Consequently, calls for reforming the PA started emanating simultaneously from the US, from Israel, from leading figures within the PA and a range of individuals and groups from the opposition and civil society.<sup>126</sup> As Arafat himself had gradually emerged as the focus of concern, reforms were most likely to be successful insofar as they were directed at him personally, meaning public finances and constitutional reform.<sup>127</sup> This chapter primarily deals with the constitutional aspect of the reforms, namely the 2003 amendment of the Basic Law. The 2003 amendment was first of all directed towards weakening Arafat. It was believed that the most efficient way of doing so by way of constitutional means would be to introduce a prime minister to share power with the president. The question is how comprehensive the constitutional amendment was intended to be, and whether it was allowed to play a significant role. The amendment must be seen in light of the broader wave of reforms that were initiated in 2002 and 2003. I will briefly outline the main aspects reforms and the internal and external agendas that inspired the reforms. What choices were made in 2003 regarding to the amending of the Basic Law, and how can these choices be explained?

### ***The 2003 amendment of the Basic Law***

In 2002, the Middle East Quartet was established to promote an end to the violent conflict. They started working on a comprehensive set of reforms, which came to be known as the Roadmap. The document, “A Performance-Based Roadmap to a Permanent Two-state Solution to the Israel-Palestinian conflict”,<sup>128</sup> was presented to the Palestinians on 30 April 2003 after intense negotiations between the USA and the three other members of the Quartet.<sup>129</sup> The reform plan outlined comprehensive changes to the Palestinian political system and aimed directly at weakening the role of Arafat. The Roadmap does not mention the presidency, but contains references to an “empowered prime minister, “an empowered interior minister” and “an empowered reform cabinet”. Within May 2003, the PA was to start working on “comprehensive political reform” to prepare for statehood. Furthermore, the document states that the PA should start working to produce a draft constitution to be circulated for public debate by a constitutional committee. The Roadmap explicitly states that the constitution was to be “based on strong

---

<sup>126</sup> Hammami, “Interregnum.”

<sup>127</sup> Brown, “Evaluating Palestinian Reform,” 10, 14.

<sup>128</sup> *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, Washington, 30 April 2003. Israel Ministry of Foreign Affairs.

<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm> (last accessed 20 January 2008).

<sup>129</sup> International Crisis Group, “A Middle East Roadmap to Where?,” ICG Middle East Report, No. 14 (Amman: 2 May 2003), [http://www.crisisgroup.org/library/documents/report\\_archive/A400962\\_02052003.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400962_02052003.pdf) (last accessed 20 January 2008), 1.

parliamentary democracy and cabinet with empowered prime minister”. While there were efforts to complete a new constitution,<sup>130</sup> this was put aside in favor of a less comprehensive measure: amending the existing Basic Law. The following is an outline of the main features of the 2003 amendment. The main focus is on intra-executive relations as the reforms primarily concerned the distribution of powers between the presidency and the cabinet

The 2003 amendment provided for a directly elected president to serve for a fixed term (Art 34, 36). The introduction of a prime minister brought a dual power structure with a prime minister alongside the president, and the Palestinian political system was changed from a purely presidential system into a semi-presidential system. In such a system, the president and prime minister will have to agree over who is to control so-called residual rights. Residual rights can be defined as the right to exercise discretionary power in situations that are not explicitly regulated by formal procedures.<sup>131</sup> As far as residual rights are concerned, the 2003 amendment explicitly favored the cabinet. In the Amended Basic Law the issue of residual rights is addressed in Art 38 and 63. Art 38 states that the president “shall exercise his executive duties as specified in this law”. Art 63 stipulates that all powers that are not explicitly awarded to the president under the Basic Law shall fall under the competency of the cabinet by default.

The president’s role was restricted in several additional ways. The PLC Basic Law promulgated in 2002 had explicitly provided the president with the right to propose laws. In the 2003 Amended Basic Law, there is no such role specifically assigned to the president, but he retains his right to propose amendments (Art 41). He also retains his right to issue decrees “that have the power of law” in “cases of necessity that cannot be delayed, and when the Legislative is not in session” (Art 43). Such decrees are to “be presented to the Legislative Council in the first session convened after their issuance, otherwise they will cease to have the power of law”. If the PLC does not approve the decrees, “they shall cease to have the power of law”. This was intended to diminish the presidential role in the legislative process.

The president appoints the prime minister and authorizes him to form his government. The president may dismiss the prime minister (Art 45), in which case the existing cabinet is to continue in a caretaker capacity until a new cabinet is granted confidence by the PLC (Art 78.3). While there are limits as to what the president can do, he may not be questioned by the PLC. Also, the president is still authorized to declare a state of emergency, without consulting with the

---

<sup>130</sup> See Brown, “The Third Draft Constitution for a Palestinian State: Translation and Commentary By Nathan J. Brown.” Palestinian Center for Survey and Policy Research, Domestic Politics and Government (October 2003), <http://www.pcpsr.org/domestic/2003/nbrowne.pdf> (last accessed 18 January 2008).

<sup>131</sup> Timothy Frye as quoted in Oleh Protsyk, “Intra-Executive Competition between President and Prime Minister: Patterns of Institutional Conflict and Cooperation under Semi-Presidentialism” in *Political Studies*, Volume 54, No. 2 (June 2006), 226.

prime minister or PLC speaker (Art 110). While the prime minister is intended to be a strong figure, the president remains insulated from parliamentary oversight. The ability to unilaterally declare a state of emergency is significant, although it should not be overestimated as the president's ability to act under the state of emergency remains limited.

The 2003 amendment enhanced the role of the prime minister, but also of the cabinet as a whole. Art 63 provides for the “empowered cabinet” called for in the Roadmap and states that:

The Council of Ministers (the “government”) is the highest executive and administrative instrument; it shoulders the responsibility for implementing the program that has been approved by the legislative branch. Except for the executive powers of the President of the National Authority, as specified in this Basic Law, executive and administrative powers shall be within the competence of the Council of Ministers.

In other words, powers that are not specifically addressed in the Basic Law fall to the cabinet, and not the president. In addition, Art 69.7 states that the cabinet is “responsible for maintaining public order and internal security”, while the president retains his role as “Commander-in-Chief of the Palestinian forces” (Art 39). The cabinet is specifically authorized to “establish or dissolve agencies, institutions, authorities and similar administrative units belonging to the executive apparatus of the government, provided that each shall be regulated by law (Art 69.9.a) and to appoint heads of institutions and agencies mentioned above (Art 69.9.b). Previously, establishment of such organs and their respective heads were to happen “according to law” (Art 77, PLC Basic Law), a much vaguer provision. Furthermore, the areas of responsibilities of the ministries were to be specified by the cabinet.

With the 2003 amendment significant powers were transferred from the president to the prime minister, such as appointing, dismissing and accepting the resignation of ministers (Art 68.1), presiding over sessions of the council of ministers (Art 68.2), and signing and issue regulations that are approved by cabinet (Art 68.7). The amendment did not introduce a parliamentary system. Rather, the new system fulfills Sartori's criteria for semi-presidentialism. The president is head of state and is elected for a fixed term. The president is independent from parliament. He or she shares executive power with the prime minister, but cannot act alone. The prime minister heads the government and is dependent on parliamentary support while doing so.<sup>132</sup>

PLO-PA relations were not directly addressed in the amendment. The one provision concerning the PLO remained unchanged. One characteristic feature informal political life would, however, change. The joint PLO-PA “leadership” meetings that were held by Arafat prior to his siege in his headquarters in Ramallah, were not reactivated after the creation of the prime

---

<sup>132</sup> Sartori, *Comparative Constitutional Engineering*, 121-122.

minister. On the other hand, both Mahmoud Abbas (Fatah) and his successor, Ahmed Qureia (Fatah) knew that every PA cabinet meeting chaired by them was followed by a PLO Executive Committee meeting chaired by Arafat. Both the Fatah Central Committee and the Executive Committee might also be convened upon prior to important PLC sessions in order to define a common approach. Consequently, the PLO retained its position as the “highest reference” in Palestinian politics.<sup>133</sup>

The articles concerning the PLC were also not changed in the 2003 amendment. A strong parliament is characterized by being institutionally central.<sup>134</sup> That implies that the parliament is awarded a genuine political role within an accepted and established constitutional framework. Secondly, a strong parliament is featured by institutional capacity, meaning that they have sufficient staff, material resources and expertise. The Roadmap contained elements of both. It required the Israeli government to facilitate travel of Palestinian officials for PLC and Cabinet sessions, training, electoral and other reform activity and other supportive measures related to reform efforts.<sup>135</sup> As for institutional centrality, the position of the PLC was only indirectly strengthened by the allocation of more powers to the cabinet, which – unlike the president – can be questioned and brought down by the PLC. The main intention of the amendment was, however, to strengthen the cabinet.

### ***Immediate impact: Abbas resigns***

Once the constitutional amendment had been approved by the PLC, Abbas assumed his tasks as the first Palestinian prime minister on 29 April 2003. Until the 2003 amendment, the Palestinian cabinet had not met regularly as a single entity. The PA cabinet and the PLO Executive organs were overlapping in both membership and functions.<sup>136</sup> From the PA started operating in 1994, President Arafat made sure that PLO Executive Committee members were included in PA cabinets. On the eve of the first PLC elections in 1996, Arafat started to hold joint meetings with the cabinet to set PA policy. This eroded the cabinet and robbed it from any independent political power. Indirectly, it also undermined the authority of the PLC, which the cabinet was partially drawn from.<sup>137</sup> The 2003 amendment was intended to enable the cabinet to assert itself as a

---

<sup>133</sup> Parsons, *The Politics of the Palestinian Authority*, 290-291.

<sup>134</sup> Abdo Baaklini, Guilain Denoeux, and Robert Springborg, *Legislative Politics in the Arab World: The Resurgence of Democratic Institutions* (Boulder: Lynne Rienner, 1999), as quoted by Nathan J. Brown, “Mechanisms of Accountability in Arab Governance: The Present and Future of Judiciaries and Parliaments in the Arab World,” United Nations Development Program, Programme on Governance in the Arab Region, <http://www.undp-pogar.org/publications/governance/nbrown/potential.html> (last accessed 16 October 2007).

<sup>135</sup> Brown, “Mechanisms of Accountability in Arab Governance.”

<sup>136</sup> Hilal and Khan, “State formation under the PNA,” 86.

<sup>137</sup> Parsons, *The Politics of the Palestinian Authority*, 209.

distinct institutional entity as opposed to the presidency and the PLO respectively. In reality, the introduction of the new office immediately unleashed a series over disputes over the powers of the prime minister, the formation of a new cabinet, and the policies it would pursue.<sup>138</sup>

While presidential systems are prone to conflict between the president and the legislative, semi-presidential systems are generally prone to conflicts between the president and a parliament-supported prime minister. Conflicts between the president and the prime minister are described by Oleh Protsyk, who refers to them as “intra-executive conflicts” over policy issues, the right to issue executive orders and regulations, appointments and dismissals of government officials, and whether or not the president should participate in cabinet meetings. No legal document can lay out all aspects of intra-executive relations in every minute detail. The right to exercise discretionary power in situations that are not specifically regulated by formal procedure has been referred to as residual rights. Such residual rights require that the president and prime minister are able to agree about who controls them.<sup>139</sup>

Abbas and Arafat were not able to agree, and Abbas’ tenure would be an extraordinarily short one. Already on 6 September, Abbas presented Arafat with his letter of resignation. It is noteworthy that in his resignation speech to the PLC, Abbas stated that: “I became prime minister with a mandate from the Central Committee, and if the committee decides to withdraw that mandate, my cabinet would fall. This would be proper.” Dismissing all charges that the PLO had been sidelined, Abbas reminded the council that he had been entrusted the premiership by a unanimous votes “in both the PLO and Fatah Executive Committees, as well as by the unanimous vote of the Central Council”, and that he “even won 51 votes in your esteemed chamber”.<sup>140</sup> While recognizing the PLC’s right to authorize ministers, Abbas also submitted to the principle that the PLO has the first choice. Abbas’ resignation speech spoke volumes on the cabinet’s inability to exert their powers as stipulated in the Amended Basic Law:

Yet every day I receive a new decree signed by Abu Ammar [Arafat] telling that I do not know what to do with [sic]. The embassies are not for us to interfere with. What is the job of the foreign minister? No one knows. Provincial governors are not our affair, so, why have an interior ministry? The airport is outside our jurisdiction. So who should run the airport? The PLO? This means that ministers have no authority over their employees; promotions, appointments, demotions, and dismissals are all taken care of by the leadership. I have not heard of anything like this anywhere in the world, where ministers are not responsible for their employees.<sup>141</sup>

---

<sup>138</sup> ICG, “A Middle East Roadmap to Where?” 11.

<sup>139</sup> Protsyk, “Intra-Executive Competition between President and Prime Minister,” 225-226.

<sup>140</sup> Abbas, “Resignation speech to the Palestinian Council,” 166.

<sup>141</sup> Prime Minister Mahmoud Abbas, “Resignation speech to the Palestinian Council,” PLC in Ramallah, 6 September 2003, *Journal of Palestine Studies*, Vol. 33, No. 2 (Winter 2004), 169.

On the level of cabinet-president relations, Abbas and Arafat clashed over policy issues relating to how the armed resistance groups should be dealt with. Arafat wanted to keep his options open, whereas Abbas had become convinced that the militancy of the second intifada had come to endanger Palestinian national interests.<sup>142</sup> According to Abbas himself, the difference between the two was that Abbas would have preferred better coordination between the various armed groups, whereas Arafat directly opposed any kind of coordination. Abbas further claimed that consolidating the security forces in three branches was a specifically external demand, and feared that confronting the armed fractions would lead to civil war.<sup>143</sup> There were also clashes over bureaucratic appointments. Attempts at dismissing head of the PA Employees Bureau, Abu Sharia, and replace him with Sakhr Bseiso, were not only ignored, but in fact overturned when Sharia in the words of Abbas used “his goons to keep himself in office”. Arafat, apparently, did not intervene. Attempts at appointing a minister of sports were contravened by Arafat, who stated that “Appointing ministers is the responsibility of the PLO and its president!”<sup>144</sup>

Arafat also had personal motives to work against the reform as he feared the impact of the combination of a prime minister and strong international backing with a security chief enjoying both foreign support and powerful domestic influence.<sup>145</sup> Accordingly, Arafat made efforts to prevent power from being redistributed, and Abbas chose to back down. He was replaced by former PLC Speaker Ahmad Qureia, a member of the Fatah Central Committee who proved to be a considerably more compliant minister than Abbas had been. Before Abbas resigned, he had managed to negotiate a truce which ended the second intifada. With Arafat’s death in November 2004, the perceived main obstacle to reform was removed. Arafat’s demise in combination with a relative calm caused international society to devote less effort to internal Palestinian affairs. After Abbas’ resignation, the reform wave gradually lost pace.

Qureia served as prime minister from October 2003 until February 2005, when presidential elections were held following the death of Arafat. The elections were a major test for the Basic Law, and procedure was followed to the letter. However, the new president – which had publicly committed himself to the reform, was now constitutionally in a weaker position to actually promote it Brown points out that Qureia had spent much effort in mediating between reformers and Arafat, “which in many cases meant deflecting calls for reform”.<sup>146</sup> The limitations

---

<sup>142</sup> ICG, “A Middle East Roadmap to Where?” 13.

<sup>143</sup> Abbas, “Resignation speech to the Palestinian Council,” 169.

<sup>144</sup> Abbas, “Resignation speech to the Palestinian Council,” 169.

<sup>145</sup> ICG, “A Middle East Roadmap to Where?” 13.

<sup>146</sup> Brown, “Evaluating Palestinian Reform,” 12-13.

that had been imposed on the presidency by the 2003 constitutional reform led president Abbas to work around the prime minister in order to promote further reforms.

January 2006 marked a major turning point in Palestinian political history as the parliamentary elections brought the Islamic movement Hamas<sup>147</sup> to a majority in the parliament. This would bring about a reinstatement of the strong Palestinian presidency. Also the Hamas cabinet would prove unable to impose its will on the bureaucracy. The combination of strikes and international sanctions crippled the work of the new PLC and the Hamas led cabinet. The level of conflict between the cabinet and the president were brought to unprecedented heights and had a major impact on the prospects of the 2003 amendment and related reform effort. The immediate aftermath was, however, that the first prime minister resigned over such residual rights as were outlined above, and that Palestinian cabinets have remained weak.

### ***Cosmetic or real?***

A majority of the Palestinian political elite saw the appointment of a prime minister as “a necessary prerequisite to resuming the peace process and PA reconstruction, or both”.<sup>148</sup> However, the feasibility of a premiership based political system is questionable. This derives from the indispensable role played by Arafat in pushing through the very reform that was specifically designed to weaken his position. The combination of nationalistic concerns related to the incomplete liberation and Arafat’s symbolic significance made it difficult to undercut his position. Said one PLC member to the ICG: “Under circumstances in which Israel and the U.S. are actively seeking to undermine our legitimate and elected national leader, however, we considered it inappropriate to excessively reduce Arafat’s role.”<sup>149</sup>

But the reform discourse also glossed over internal power struggles over access to power and resources. This complicated the reform effort itself and masked the true intentions of the various actors. By calling for reforms, it was possible to align oneself with the Americans while at the same time maintaining a populist image. In the words of Palestinian academic Rema Hammami, “reform for such figures means that one can strike an ‘oppositional’ pose while attempting to recoup one’s lost ground within the existing power structure”.<sup>150</sup> Palestinian local

---

<sup>147</sup> Hamas grew out of the Moslem Brotherhood in Egypt and was established as a separate “wing” in the West bank and Gaza shortly after the outbreak of the Intifada in January 1988. They call for an Islamic state in entire Palestine and oppose the Oslo Accords, but have in recent years hinted that they would accept a long term truce and leave the final decision of the relationship with Israel to coming generations. Sami Abu Zuhry, interview, Gaza 6 July 2005. For more on the ideology and establishment of Hamas, see Shaul Mishal and Avraham Sela, *The Palestinian Hamas: Vision, Violence and Coexistence* (New York: Columbia University Press, 2000), 35-37.

<sup>148</sup> ICG, “A Middle East Roadmap to Where?” 12.

<sup>149</sup> ICG, “A Middle East Roadmap to Where?” 11.

<sup>150</sup> Hammami, “Interregnum.”



journalist Talal Awqal points out that “Nobody will say that they are against reform. Nobody. Because all the people want reform, so who is going to say that I am against?”<sup>151</sup> A report by International Crisis Group (ICG) points to the lack of a clearly defined message in the reform agenda:

The confusion and overlap between the domestic agenda for institutional change, internal struggles over the political direction of the Palestinian national movement and international pressure to undercut Arafat helped muddy the picture. Naming a prime minister was one of the demands of those favoring greater accountability and decision-making procedures in the PA, but it also – and perhaps principally – represented “a calculated political initiative by the PA to secure its position in view of the impending war in Iraq and the expected release of the Quartet Roadmap thereafter.”<sup>152</sup>

The strong verbal commitment among Palestinian politicians to liberal democratic government as well as a growing body of written plans, laws, committees, and proclamations demanding reforms clouded the fact that the domestic reform coalition was fragmented and heterogeneous, and that the external and domestic reform agendas were not aligned.<sup>153</sup> This makes it hard to evaluate the real extent of reforms. Similarly, the external actors who pushed for reform represented varying agendas. European donors believed that only a capable and institutionalized PA would be an effective partner in a renewed peace process. The USA sought to weaken Arafat’s authority as they held him personally responsible for domestic problems in general and the second intifada in particular. Thus, the USA tended to support measures that would weaken Arafat, such as the establishment of a prime minister and increasing cabinet control over security and the budget.<sup>154</sup> This agenda was motivated by personal and not institutional considerations.

Ottaway has argued that significant reforms should make power more accountable to a popular mandate.<sup>155</sup> The 2003 amendment had this potential as it transferred powers from the president to a prime minister which the PLC could hold accountable. The importance of this would depend on whether the cabinet was in fact able to exercise its powers. As Arafat directly counteracted the reforms, significant power remained with the president, who was not accountable to the elected PLC. Strengthening the popular mandate would also require elections for the PLC, which had served since 1996. This did not happen until 2005, probably due to the likelihood that a new election would reinforce Arafat’s legitimacy, and this would be detrimental to the objective of weakening him.<sup>156</sup> Ottaway has further pointed out that significant reforms must impose

---

<sup>151</sup> Talal Awqal, interview, Gaza, 5 July 2005.

<sup>152</sup> ICG, “A Middle East Roadmap to Where?” 11.

<sup>153</sup> Brown, “Evaluating Palestinian Reform,” 5; and Brown, “Requiem for Palestinian Reform,” 9, 15.

<sup>154</sup> Brown, “Evaluating Palestinian Reform,” 9.

<sup>155</sup> Ottaway, “Evaluating Middle East Reform,” 10.

<sup>156</sup> ICG, “Who Governs the West Bank? Palestinian Administration under Israeli Occupation,” “ICG Middle East Report, No. 32 (Amman: 28 September 2008),

limitations on the executive.<sup>157</sup> By contrast, the stated aim of the 2003 amendment according to the Roadmap was to achieve a redistribution of power *within the executive* by empowering the cabinet vis-à-vis the presidency. An empowered cabinet was to quell violent opposition and comprise of moderates willing to negotiate. Hence, the amendment did not in fact serve to limit executive power.

Additionally, significant reforms should allow new centers of power to emerge. There was a debate between reformers who wanted a powerful minister and Arafat loyalists who sought to protect their own power and subsequently wanted a weak prime minister. There was also a debate between senior PA officials who wanted a technocratic cabinet and those who wanted a senior Fatah figure in the post.<sup>158</sup> Reformists saw wresting the PA from Fatah dominance as one of the goal of the reforms.<sup>159</sup> Forming “technocratic” cabinets composed of unaffiliated members with professional expertise was seen as one way of accomplishing this. Abbas was widely expected to appoint such a cabinet in 2003, but his cabinet comprised a number of Fatah heavyweights, as did Qureia’s first cabinet.<sup>160</sup>

Two things should be noted. Technocrat governments would have to be largely drawn from non-PLC members, and the Interim Agreement explicitly states that only 20 percent of ministers can be appointed from outside of the PLC (Art V.4.c). Secondly, while the concept of technocrat cabinets in the Palestinian context tends to be associated with professional government, such cabinets can in fact be symptomatic of fragmented and weak parliaments.<sup>161</sup> Technocrat cabinets will likely consist of ministers who lack power bases within the established fractions. In 2005, the first PA technocrat cabinet was appointed, and its track record would confirm the argument above. The technocrat cabinet was brought about as a compromise by various factions within Fatah whereby no leading figures were to be ministers, with the notable exceptions of Qureia and Central Council member Nabil Shaath. The government was not able to gain a monopoly on power, and the security situation grew gradually worse.<sup>162</sup> According to Abdul Mahdi Hadi, chairman of the Palestinian Academic Society for the Study of International Affairs (PASSIA), Palestinians were “stuck with political elites, moderates [with a] weak, business-like

---

[http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/32\\_who\\_governs\\_the\\_west\\_bank\\_palest\\_admin.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/32_who_governs_the_west_bank_palest_admin.pdf) (last accessed 20 January 2008), 29.

<sup>157</sup> Ottaway, “Evaluating Middle East Reform,” 10.

<sup>158</sup> Klein, “Reforming the Palestinian Authority,” 209-210.

<sup>159</sup> Brown, “Evaluating Palestinian Reform,” 15.

<sup>160</sup> Charmaine Seitz, “Appointing Abu Mazen: A Drama with Two Enactments,” *Middle East ReportOnline* (1 May 2003), <http://www.merip.org/mero/mero050103.html> (last accessed 18 November 2007).

<sup>161</sup> Protzyk, “Intra-Executive Competition between President and Prime Minister,” 224.

<sup>162</sup> ICG, “Who Governs the West Bank?” 18.

mentality” in lack of national pride.<sup>163</sup> This led to widespread internal discontent, and in October 2005, the PLC demanded the government’s resignation. The PLC did have the constitutional power to bring the cabinet down, but stopping short of a vote of no confidence, the PLC simply asked President Abbas to dismiss the cabinet. Abbas refused, arguing that there would be a new government after the January 2006 elections. The 2003 amendment had aimed to empower the cabinet at the expense of the presidency. Instead, the PA came to be ruled by its weakest cabinet to date, consisting of ministers who did not have independent power bases within Fatah.<sup>164</sup>

Brown points out that Arafat’s demise in 2004 “illustrated some of the problems with personalizing reform”. The new institutional setup was designed to bring Abbas to influence and weaken Arafat. The reforms were “political” rather than “reformist”<sup>165</sup> and did not enter into any long term vision for the Palestinian political entity. Arafat had been able to limit the impact of the constitutional reforms that had been aimed primarily towards weakening him, but the presidency as an institution had been weakened in a way that made it more difficult for his successor to move reform forwards without overstepping his constitutional boundaries.<sup>166</sup>

The 2003 amendment and its potential for significance must be seen in light of the *relative* importance attached to the goals of Israeli security and Palestinian democracy and liberation. Two main approaches can be distinguished: *Reformists* who seek to enhance democratic control, and *restructurists* who pursue a personalized agenda aiming to enhance the powers of their current allies or their own personal interests.<sup>167</sup> For Israel, security was the primary goal, whereas Palestinian democracy and liberation were seen as secondary or irrelevant. Democracy and liberation were perceived by Israel as having low instrumental value in realizing the goal of security, compared to the advantages of military force. For the PA, liberation was primary, and democratization was secondary, where Israeli security was seen as secondary or irrelevant.

There was, however, disagreement among Palestinians as to the instrumental value of democracy and Israeli security in the realization of the primary goal, which was liberation. The Basic Law as well as its amendments displays inconsistencies that are best explained in the light

---

<sup>163</sup> Mahdi Abdul Hadi, interview, Jerusalem, 27 June 2007.

<sup>164</sup> Ben Fishman, “A New Palestinian Cabinet,” PeaceWatch #493, 25 February 2005. The Washington Institute for Near East Policy, <http://www.washingtoninstitute.org/templateC05.php?CID=2264> (last accessed 19 July 2007).

<sup>165</sup> ICG, “A Middle East Roadmap to Where?” 11.

<sup>166</sup> Brown, “Evaluating Palestinian Reform,” 13.

<sup>167</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 23. Friedrich separates between what he calls the reformist agenda and the restructurist agenda in the effort to reform the Palestinian security sector. The reformists, represented by the Palestinian citizenry and civil society with external support from the EU, have been seeking to bring the security apparatus under democratic control. The restructurist agenda, represented by Israel, the USA and by some Palestinian political actors, sought regime change and “the dismantling of the Arafat era.”

of these conflicting agendas. While this may seem trite, the effects on Palestinian constitutional developments have been considerable. It means that there was not enough critical mass, even within the PA, to push through a truly reformist agenda. Under the combined leadership of Prime Minister Qureia and President Arafat, the reform wave gradually petered out. However, as the truce negotiated by Abbas as prime minister held, pressure on the PA to reform subsided. After Arafat's death, reform agendas would have to be reconsidered.<sup>168</sup> The next chapter deals with constitutional development under President Abbas.

---

<sup>168</sup> Brown, "Evaluating Palestinian Reform," 12-13.

*The conference recommends to the Legislative Council that it take steps to amend the legislative elections law, relying on an equal division (of seats) in a mixed system...*

- The Cairo Declaration

#### **4. The 2005 amendment: Preparing for Hamas**

In November 2004, President Yasser Arafat passed away. As stipulated in the Amended Basic Law (Art 37), PLC Speaker Rawhi Fattouh assumed the PA presidency in a caretaker fashion, while Abbas was appointed as PLO Chairman by the PLO Executive Committee. On 9 January 2005, Abbas won the elections for the Palestinian presidency. As president, Abbas committed himself to pursue the reforms that had been initiated in 2003, and to seek an implementation of the Roadmap. A number of laws that had been passed by the PLC and ignored by Arafat were now signed. Local elections in Gaza and the West Bank were initiated, and the cabinet and the PLC started working on legislation for the judiciary and the security forces.

Parallel to legislative efforts and the holding of local elections, Abbas worked to integrate Hamas into the institutionalized decision making process. He knew that in order to make progress with the Israelis, he would have to show ability to quell Palestinian armed resistance. As disarmament by force was inconceivable, Abbas worked to persuade Hamas to pursue their interests by way of the political institutions. As part of the PLC, Abbas figured that Hamas would no longer ignore laws emanating from the PLC.<sup>169</sup> The effort succeeded with the Cairo Declaration<sup>170</sup> in March 2005, when all the factions except Islamic Jihad declared their intention to enter the political system and exert influence through institutionalized channels on a national level. Hamas had already engaged in the political process by entering local elections, starting in December 2004.<sup>171</sup> The Cairo Declaration was the culmination of months of negotiations. There, representatives of the Palestinian leadership and all the Palestinian factions signed a document that committed the factions to a unilateral truce and the Palestinian leadership to hold local and PLC elections and to initiate a process to restructure the PLO.

As the date of elections for the PLC, originally scheduled for August 2005 drew nearer, it became increasingly evident that Hamas would perform very well. A significant indicator was an

---

<sup>169</sup> ICG, "Enter Hamas: The Challenges of Political Integration," ICG Middle East Report, No. 49, 18 January 2006), [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/49\\_enter\\_hamas\\_the\\_challenges\\_of\\_political\\_integration.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/49_enter_hamas_the_challenges_of_political_integration.pdf) (last accessed 20 January 2008), 4.

<sup>170</sup> *The Cairo Declaration*, 17 March 2005. United Nations Information System on the Question of Palestine, <http://domino.un.org/UNISPAL.NSF/d80185e9f0c69a7b85256cbf005afeac/69b9d56df48732c48525708a0053358b!OpenDocument> (last accessed 18 November) 2007.

<sup>171</sup> Butenschön and Vollan, "Democracy in Conflict," 119.

ongoing series of local elections in which Hamas gained control of a number of municipalities.<sup>172</sup> Fatah was split in a number of issues with members working to promote personal, party and national interests without any coherent order or priorities attached to each of the above. In the words of Fatah Central Committee member, Sakhr Habash: “You can’t make a decision in the Central Committee for most of the members of Fatah to act [in a certain] way. They won’t accept that. ...Everybody is thinking of his own power.”<sup>173</sup> Roughly, individuals and groups within Fatah were working to get reelected and ensure the party’s continued hegemony in the PA. At the same time, Fatah was ridden by an internal struggle related to the lack of internal democracy in the movement and the holding of Fatah sixth General Conference with elections for the Fatah Revolutionary Council and Central Committee.<sup>174</sup> The process leading up to the amended elections law and proposals for amendments of the Basic Law indicates that groups and individuals were aiming at limiting the influence of Hamas within the PLC. Intentions are difficult to verify, but the factors mentioned above would explain why a number of proposed laws, laws and policies in this period did not continue the logic of the 2003 reforms.

In August, the new election law set the term of the presidency and the council to four years, deleting previous references to “the transitional period”. A related 2005 amendment was minimal and only affected Articles 36, 47, 48, and 55.<sup>175</sup> However, the PLC’s legal committee had initially proposed amendments that went far beyond the necessary adjustments and would have given the president extensive powers in the areas of legislation, security and public administration.<sup>176</sup> In this chapter, I will discuss how the heralded participation of Hamas in Palestinian institutions influenced the Basic Law and the further outcome of the 2003 amendment. My focus is on the adoption of a new election law and the 2005 amendment to the Basic Law.

---

<sup>172</sup> For a thorough examination of the local elections, see Butenschön and Vollan, “Democracy in Conflict,” 119-128. Results of all local elections held can be found on the website of the Palestinian Central Elections Commission, <http://www.elections.ps> (last accessed 18 February 2008).

<sup>173</sup> Sakhr Habash, interview, Ramallah, 14 July 2005. For a presentation of the various Fatah coalitions that had emerged from the early days of the PA, see Ali Jarbawi “Palestinian Politics at a Crossroads,” *Journal of Palestine Studies*, Vol. 25, No. 4 (Summer 1996), 34-36.

<sup>174</sup> The Fatah General Conference is the highest authority within Fatah and is responsible for electing members to the Revolutionary Council and the Central Committee. The conference is obliged to meet every five years after an invitation from the Central Committee, unless circumstances prevent it. In practice, the Conference has been assembled less frequently. General conferences have been held in 1967, 1968, 1971, 1980 and 1989. See Parsons, *The Politics of the Palestinian Authority*, 132-136 for further detail.

<sup>175</sup> PLC, *The Basic Law of 2005 A.D. Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003*. Bir Zeit Institute of Law, Al Muqtafi, 17 November 2006, via The Internet Archive Internet Archive on <http://web.archive.org/web/20070608180556/http://muqtafi.birzeit.edu/data/txt/2005/14860.htm> (last accessed 20 January 2008).

<sup>176</sup> Jihad Harb and Khalil Shikaki, “Towards a more open and inclusive political system: A return to a presidential system is a return to instability” (executive summary, policy paper by The Palestinian Center for Policy and Survey Research, Ramallah: October 2005). The North South Institute, [http://www.nsi-ins.ca/english/pdf/PalestinePolicyBrief\\_Nov\\_05\\_Eng.pdf](http://www.nsi-ins.ca/english/pdf/PalestinePolicyBrief_Nov_05_Eng.pdf) (last accessed 26 January 2008), 2-3; and Jihad Harb, interview, 24 July 2005, Ramallah.

The 2003 amendment and related reforms had been directed towards enhancing *cabinet* power. In contrast, a number of the 2005 proposals were related to the *president* and the *legislative council*.<sup>177</sup> Two questions emerge: What prompted the 2005 proposals in the first place, and why were they rejected?

### ***Passing a new election law***

The Palestinian 1995 Law of Elections had been specifically designed for one election only. As the interim period expired in 1999, and the pressure for new elections for Palestinian institutions increased, it became necessary to pass a new election law for the Palestinians. This had been part of the Roadmap, but external fears that elections would reinforce Arafat's legitimacy combined with internal problems in Fatah led to repeated delays in the period from 2003 until 2005. When serious work on the new law began, two issues were of concern: party and candidate restrictions, and the translation of votes into seats.

Constitutional practices influence which groups and individuals will be able to compete effectively for positions of authority.<sup>178</sup> Accordingly, exerting influence over the electoral system is exerting influence over who will be able to compete for institutionalized power, and whose interests will be pervasive. The original Palestinian election law specifically barred parties and candidates who advocated racist attitudes from participating in the elections. This was not enough to meet the demands of the Interim Agreement, which also excluded candidates, parties or coalitions who pursued the implementation of their aims by "unlawful or nondemocratic means", aka terrorism and armed resistance (Annex II, Art 3.2, Protocol Concerning Elections). This discrepancy between the Interim Agreement and the 1995 Law of Elections was largely ignored because the Islamic opposition which these articles referred to had decided to boycott the elections anyway.<sup>179</sup> A proposed draft for a Political Parties' Law presented by the PLC in 1998 would have banned any party which seeks to topple the constitutional government, threatens the independence and unity of the country, calls for war and international violence, or jeopardizes democratic political life and regional and social unity (Art 8). Article 16 would have given the Ministry of Justice the right to prevent any party from registering if its basic system and documents were in contradiction to Palestinian law. According to Mohammed Yaghi, the draft law would also have required that legal political parties would have to be member of the PLO.

---

<sup>177</sup> The PLC Legal Committee, *A draft law amending the Basic Law – 2003*, The Palestinian Legislative Council, The tenth term – first round, The first session, 13th meeting Held in the city of Gaza Tuesday, Wednesday and Thursday 19-21, 2005.

<sup>178</sup> Klug, *Constituting Democracy*, 7.

<sup>179</sup> *Political Parties Draft Law*, submitted to ARD 30 September 2007, nonofficial translation by ARD. USAID, [http://www.usaid.gov/wbg/misc/Political\\_Parties\\_Law\\_-\\_Eng.pdf](http://www.usaid.gov/wbg/misc/Political_Parties_Law_-_Eng.pdf) (last accessed 21 January 2008).

That meant that Hamas and Palestinian Islamic Jihad would have had to join the PLO and register with the Ministry of Justice before being considered legal.<sup>180</sup> The Political Parties' Law was never enacted. Hence, the 2005 decision of Hamas to participate in elections reintroduced the question of whether or not the armed factions should be pressed for concessions in order to be allowed to run for elections.

Fatah members resented the Cairo settlement and argued that Abbas should have demanded recognition of the 1998 Algiers declaration, where the PLO formally endorsed a two-state solution. They also argued that Hamas should renounce attacks on targets outside of the occupied territories, and that specific measures on disarmament were taken.<sup>181</sup> Abbas countered that Hamas would have to be integrated into the political institutions before they could be persuaded to give concessions. Israel argued that the Cairo Declaration did not satisfy their demands by denouncing violence. They threatened to obstruct the elections if Hamas were to participate and to end cooperation with the PA if Hamas should join the cabinet. On behalf of the international community there was, however, a growing realization that Hamas would have to be reckoned with, and that Abbas was not about to disarm them by force. During a visit to Washington in May 2005, Abbas argued that a clean Fatah victory would deal a blow to Sunni Islamist militancy in the Middle East.<sup>182</sup> The U.S. simultaneously argued that while Hamas' participation in the political process would require recognition of Israel, disarmament and renunciation of violence of terror, electoral participation could be also be a prelude to such concessions.<sup>183</sup> They also feared demanding an exclusion of the armed factions from PLC elections could endanger the truce.<sup>184</sup>

When the international community later began to realize Hamas' full electoral potential, they recognized that it would be too late to extract concessions and focused instead on making strategies for the post-election situation.<sup>185</sup> U.S. Secretary of State, Condoleezza Rice stated that the process had to be "a Palestinian process",<sup>186</sup> and that: "We do, I think, need to give the Palestinians some space to try and reconcile their national politics, but they're going to eventually

---

<sup>180</sup> Yaghi, "Political Participation and Palestinian Legislative Elections," *PeaceWatch* #524, 31 October 2005. The Washington Institute for Near East Policy, <http://www.washingtoninstitute.org/templateC05.php?CID=2388> (last accessed 27 January 2008). I have not been able to find any requirements for PLO membership in the draft provided by ARD, but Yaghi refers to a 1998 draft whereas the translation by ARD is from 1997.

<sup>181</sup> ICG, "Enter Hamas," 4.

<sup>182</sup> ICG, "Enter Hamas," 10.

<sup>183</sup> ICG, "Enter Hamas," 29.

<sup>184</sup> ICG, "Enter Hamas," 9-10.

<sup>185</sup> ICG, "Enter Hamas," 31.

<sup>186</sup> Condoleezza Rice, Press Availability After Middle East Quartet Meeting, United Nations Headquarters, New York City, 20 September 2005. U.S. Department of State, <http://www.state.gov/secretary/rm/2005/53612.htm> (last accessed 20 February 2008).



have to disarm these groups [...] They can't have it both ways."<sup>187</sup> Israel grudgingly accepted this course of action. Hence, whereas the 2003 amendment corresponded to specific demands from the Quartet, the 2005 drafting of a new election law was primarily dominated by domestic concerns.

The former election law provided for a block vote system in multi-member constituencies, where voters have as many votes as there are seats to be filled.<sup>188</sup> There had been earlier attempts to redraft the election law, with the debate mainly focusing on whether to choose a majoritarian or a proportional system.<sup>189</sup> In 2004 the PLC Legal Committee recommended a compromise whereby 50 percent of the seats would be elected from constituencies and 50 percent from a territory-wide proportional list election. The 50-50 percent distribution in a mixed system was also part of the Cairo Declaration, which recommended that the PLC amend the Law of Elections "relying on an equal division (of seats) in a mixed system".

The draft law was hotly debated and passed through three prolonged readings. A majority of the PLC members were opposed to the 50-50 model and favored a system where one third of PLC members would be elected on one proportional list and two thirds on constituency lists.<sup>190</sup> Within Fatah there were, however, those who feared that this system would favor Hamas disproportionately.<sup>191</sup> Also the cabinet and Hamas were leaning towards a more proportional system, as had been agreed upon in the Cairo Declaration. On May 9, the cabinet proposed to eliminate the mixed system altogether in favor of a proportional system on one national list, but the proposal was rejected.<sup>192</sup> After a protracted struggle, the new law was finally passed by the PLC during an extra reading on 18 June 2005. The PLC changed the system from a purely block vote system into a system with 66 seats elected from proportional lists and 66 from constituencies.<sup>193</sup>

In explaining the final result of the debate over the election law, Butenschøn and Vollan place emphasis on the perceived need to provide a system that could compensate for the lacking internal democracy within Fatah. The two systems had not been thoroughly evaluated against the needs for reform, and there was no systematic discussion on how voter influence on candidates

---

<sup>187</sup> Condoleezza Rice, Questions Taken at Princeton University's Celebration of the 75th Anniversary Of the Woodrow Wilson School of Public and International Affairs, Princeton University, New Jersey, 30 September 2005, as released by the U.S. Department of State, <http://www.state.gov/secretary/rm/2005/54178.htm> (last accessed 20 February 2008).

<sup>188</sup> Samuels and Wyeth, "State-Building and Constitutional Design After Conflict," 19.

<sup>189</sup> Butenschøn and Vollan, "Democracy in Conflict," 90. See especially 89-102 for a thorough account of the drafting process of the new electoral system.

<sup>190</sup> Butenschøn and Vollan, "Democracy in Conflict," 98.

<sup>191</sup> ICG, "Enter Hamas," 4.

<sup>192</sup> Mohammed Yaghi, "Debating the Palestinian Election Law," *PeaceWatch* #502, 17 May 2005. The Washington Institute for Near East Policy, <http://www.washingtoninstitute.org/templateC05.php?CID=2312> (accessed 18 January 2008).

<sup>193</sup> Butenschøn and Vollan, "Democracy in Conflict," 100-101.

could be combined with a proportional system with open lists. In these questions Fatah was split along multiple lines. Some Fatah members were concerned that without a party democracy and primaries, a closed proportional list would ensure that the Fatah lists would be filled by the old guard of Fatah and PLO cadres who lacked a local electoral base and would perform badly in constituency elections.<sup>194</sup> The leadership was concerned with the overall performance of Fatah in the elections, reformists were keen to prevent party lists from being dominated by the old guard, whereas individual PLC members simply favored the system they thought would be more likely to secure their reelection.

Salah Abdel Shafi, director of the Economic Development Group in Gaza, argued that “the motivation of the members was a very egoistic and personal motivation by having 30 percent proportional and 70 percent districts. Because they think they [will] have better chances to be elected”.<sup>195</sup> According to journalist Talal Awqal “most of the members of Fatah were against a new democratic law”, and that they “were defending their benefits”.<sup>196</sup> Ghazi Hamad, editor of the Islamist newspaper al-Risalah, intended in 2005 to run for the PLC on the Hamas list. He described a Fatah of “different colors”:

Historical people in Fatah say the proportional [system] is good, because people in Gaza and the West Bank will vote for me. But some people who are not well known say I am known in my area, so I prefer two thirds ... so I think you will find different opinions inside Fatah regarding the election law.”<sup>197</sup>

Hamad further stated that, Abbas was “shocked” when the PLC did not accept the cabinet’s proposals and passed a law that stipulated two thirds on district lists and one third on a national list. According to Palestinian political analyst Mohammed Yaghi, Abbas had been greatly influenced by the Central Committee, who “gave him the legitimacy”.

If the Fatah Central Committee had not suggested that Abbas be president, Abbas would never have been a candidate for the presidency. Who would support him? So he needed them. At the same time, they wanted his support to keep them as the Central Committee for Fatah and to establish rules that supported them. [...] Abbas at the same time needed approval for his suggestions from the PLC members, and the PLC members had different approaches, different interests.<sup>198</sup>

Fatah’s PLC members and Fatah Central council members disagreed over the 2005 Law of Elections. According to Yaghi, the disagreement should be seen in light of the individual political interests of the relevant parties: “Many current Fatah PLC members see little chance for reelection as part of a national list because many of them are not well known beyond their district and

---

<sup>194</sup> Butenschøn and Vollan, “Democracy in Conflict,” 92-93.

<sup>195</sup> Salah Abdel Shafi, interview, Gaza, 1 July 2005.

<sup>196</sup> Awqal, interview, 2005.

<sup>197</sup> Ghazi Hamad, interview, Gaza, 30 June 2005. Hamad did not enter the PLC, but was appointed spokesman for Prime Minister Ismail Haniyeh.

<sup>198</sup> Mohammad Yaghi, interview, Ramallah, 18 July 2005.

clans.” They would not only have hard time winning, they would also have a hard time being favored by the Central Committee for competitive slots on a national list. Yaghi also points out that the old guard’s interest would be best preserved by being placed high on Fatah’s national list due to their lack of local support.<sup>199</sup> Yaghi argued that the cabinet and the Central Committee thought that one single national district with proportional elections would be the best way of limiting the number of seats Hamas could win in the coming elections. Another advantage would be that a proportional system would ensure representation by the smaller parties and might help bring Fatah and the smaller parties into an alliance against Hamas.

It is unclear whether or not Hamas themselves had a firm point of view on the actual system. If Hamas thought that they would get fewer votes than Fatah, it would make sense for them to demand that a higher part of the PLC to be elected by a proportional system.<sup>200</sup> Most likely, their first priority was to prevent further delays of the election date. For this reason they were opposed to any proposed changes to earlier agreements. Hamad stated that: “I think it does not matter. Hamas is not afraid of the election and the result of the election. But sometimes they become very angry when Fatah wants to create a new law according to their own interest.”<sup>201</sup>

As it turned out, electoral manipulation can be an unwieldy instrument. On the technical level, the system worked as intended by creating a clear winner. On the other hand, it became clear that individual Fatah members who fought for this system had vastly overestimated their potential for reelection on the constituency lists. Hamas won 45 out of 66 seats from the district level and 29 out of 66 seats from the national level. Fatah won 17 seats from the district level and 28 from the national level.<sup>202</sup> The system generated a clean victory, but not for the intended party. For the first time in Arab parliamentary history, a parliament was dominated by a party other than the presidential party. This was the unintended outcome of a calculated process where other options were in fact considered and consciously rejected.

The 2005 Law of Elections was not designed with a view to secure representativity, but governability. It was not intended to meet Ottaway’s criteria for a significant reform by introducing an element of pluralism.<sup>203</sup> The smaller parties and independents were in fact marginalized as the number of votes was translated into seats. Hamas’ electoral victory did, however, show that under the new law, it was possible for new groups to gain access to the

---

<sup>199</sup> Yaghi, “Debating the Palestinian Election Law.”

<sup>200</sup> Butenschøn and Volla, “Democracy in Conflict,” 100.

<sup>201</sup> Hamad, interview, 2005.

<sup>202</sup> The final distribution of PLC seats, retrieved from the Palestinian Central Elections Commission, [http://www.elections.ps/pdf/Final\\_Result\\_distribution\\_of\\_PLC\\_seats-EN2.pdf](http://www.elections.ps/pdf/Final_Result_distribution_of_PLC_seats-EN2.pdf) (accessed 19 February 2008). See Butenschøn and Volla, “Democracy in Conflict”, 141-143 for further details on election results.

<sup>203</sup> Ottaway, “Evaluating Middle East Reform,” 10.

political institutions. This was not due to reformist intentions, but to circumstances over which the legislative drafters lost control. The drafting of the new election law demonstrated how the internal conflicts in Fatah spilled over into the arena of constitutional lawmaking. Fatah politicians who sought either to enter elections for the first time or who aimed at reelections pursued whatever electoral system that seemed to maximize their chances of capturing a seat. The Fatah leadership sought to secure a clear margin for the electoral winner, and not even Hamas expected anyone but Fatah to win the majority of votes.

### ***Rejected proposals for amending the Basic Law***

The 2005 Law of Elections set the term of the presidency and the PLC to four years and stipulated that elections were to be held every four years on a regular basis. The Basic Law, however, had set the term of the presidency and the PLC to the transitional period. Consequently, the Basic Law would have to be changed. During the summer of 2005, the PLC discussed a number of proposals for a more comprehensive amendment.<sup>204</sup> The proposals were provided to me by Kåre Vollan, who served as an adviser to the PA. I have not been able to establish who wrote each of the various proposals, other than that they were prepared by the PLC Legal Committee,<sup>205</sup> and that President Abbas requested the inclusion of a vice presidency. Even so, it is possible to make some observations as to the political ends the proposals were intended to serve, and why they were rejected. At this point, Fatah was still a majority in the PLC. The proposals reflect a reality where influencing the constitutional text was a potential strategy to achieve political goals for Fatah as a movement, and for Fatah politicians on an individual basis. The fact that the proposals were not ratified underlines the perceived unlikelihood of a Fatah electoral defeat, in spite of Hamas looming on the horizon. The proposals that were struck down provide valuable insight into the relationship between political context and constitution making in the PA at that particular time.

One of the proposals would have provided for a directly elected vice president (proposed amendment to Art 5 and 34). The vice president was to assist the president in his duties, and act on the president's behalf when the president so allowed. The president would also have been able to delegate some jurisdictions to the vice president (proposed new article). In case of vacancy, the

---

<sup>204</sup> *A draft law amending the Basic Law – 2003*. The Palestinian Legislative Council, The Tenth term, first round, The first session/13th meeting, Gaza, 2005. Palestinian Basic Law, <http://www.palestinianbasiclaw.org/wp-content/uploads/2008/02/2005-proposals.pdf> (last accessed 17 February 2008). By an incuriae, the original Basic Law paragraphs in “The Basic Law of 2005 A.D. Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003” do not correspond to the 2003 Amended Basic Law, but to the 2002 PLC Basic Law. After conferring with Kåre Vollan, who was present at the discussions, I find that this is most likely due to a mistake on behalf of the PLC Legal Committee. This has consequences for the numbering and sequencing of paragraphs, but the differences are not relevant to my discussion. I have chosen to use the correct numbering of existing paragraphs, and not the numbering which is used in the draft document.

<sup>205</sup> Butenschøn and Vollan, “Democracy in Conflict,” 66.

vice president would assume the powers and duties of the presidency (new), and Art 54.2 assigning this duty to the Speaker would consequently be cancelled. The authorities of the vice president vis-à-vis those of the prime minister were not clearly outlined in the proposal, but it seems likely that a vice president would be able to sideline the prime minister. The request for a vice president was submitted directly by Abbas to the PLC, as well as in a draft amendment formulated by the PLC Legal Committee.

The motion had been cleared by Fatah in advance.<sup>206</sup> Several Fatah figures were rumored to be potential candidates for the post, including then Fatah chairman Farouq Qaddoumi, then Prime Minister Qureia then Civil Affairs Minister Mohammed Dahlan and then PLC member and Fatah Revolutionary Council member Nabil Amro.<sup>207</sup> The idea allegedly arose after Abbas was admitted to hospital with a heart condition. According to Ziad Abu Ziad (Independent), head of the PLC Legal Committee, the amendments would increase stability by creating a contingency plan in case something would happen to president Abbas.<sup>208</sup> This seems an unsatisfactory explanation, as vacancy of the presidency is already covered by the Amended Basic Law. Art 37.2, which states that the PLC Speaker is to assume the duties and powers of the president until new elections can be held within 60 days. This provision was successfully put to the test with Arafat's death in 2004.

The proposal to was interpreted by Jihad Harb and Khalil Shikaki at the Palestinian Center for Policy and Survey Research (PSR) as an attempt to ensure Fatah control over the presidency should something happen to Abbas.<sup>209</sup> They argued that the request could be interpreted as an attempt by the president and certain elements within Fatah to weaken the legislature and strengthen the president in order to maintain Fatah's dominance should Hamas do well in the January 2006 elections. However, the PLC did not review the proposal favorably.<sup>210</sup> Independent PLC member Hassan Asfour argued that the proposal would create an unnecessary and "honorary position, without work" that would "negatively affect the work of the prime minister and parliament".<sup>211</sup>

---

<sup>206</sup> *Xinhua*, "Fatah agrees to Abbas' vice president post proposal," 7 June 2005. *People's Daily Online*, [http://english.peopledaily.com.cn/200506/08/eng20050608\\_188977.html](http://english.peopledaily.com.cn/200506/08/eng20050608_188977.html) (last accessed 29 January 2007).

<sup>207</sup> The Palestinian Information Center, "PA vice-president post draws many aspirants," 6 June 2005; and "Abbas to appoint Kaddoumi as deputy PA chief," 5 June 2005. The articles are unfortunately no longer available from their website, <http://www.palestine-info.co.uk> (last accessed 18 February 2008).

<sup>208</sup> *Maan News Agency*, "PLC suggests amendments to provisional constitution," 25 July 2005, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=2261> (last accessed 29 January 2007).

<sup>209</sup> Harb and Shikaki, "Towards a More Open and Inclusive Political System," 3-4.

<sup>210</sup> *Maan*, "Members of Legislative Council block creation of the office of vice president," 27 July 2005, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=2296> (last accessed 26 July 2006).

<sup>211</sup> "PLC Member dissents to formation of office of vice president," *Maan*, 25 July 2005, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=2269> (last accessed 29 January 2007).

Had they been passed, the 2005 proposals would also have strengthened the president's legislative powers. Art 38 of the Amended Basic Law states that "The President of the National Authority shall exercise his executive duties as specified in this law". The proposal was to add that "The President has the right to issue decrees and administrative and organizational decisions as deemed necessary for the public interest in accordance with the provisions of the law" (proposed amendment to Art 38). Harb sidelines this provision with "going back to 2002 [before the 2003 amendment]".<sup>212</sup> In the 2002 PLC Basic Law, Art 58 gave the president the power to "issue regulations". With the 2003 amendment, this authority was exclusively assigned to the prime minister and the cabinet (Art 68.7 and 70). Harb argues that the 2005 proposals even moved beyond the presidential prerogative of 2002 in proposing to give the president the authority to issue "administrative and organizational decisions on the basis of public interests". Harb argues that administrative decisions should not be taken by the president: "They are usually taken by the police, by the security services, by the ministries – but not the president."

A proposed new article would have given the president "the right to call for general referendum regarding signing agreements or treaties and issues that concern the higher interests of the homeland" (new). This refers to issues of permanent borders, sovereignty, refugees, water and Jerusalem. The referendum was to be conducted through a law which was to be ratified by the PLC. Its results would be binding if they got the relative majority of the votes of people participating in the referendum (new). Harb points out that giving the president enhanced power would allow him to ignore the PLC, where he correctly assumed that Hamas would be influential: "[It would] transform the system where the PLC was a strong council and where we had strong responsibilities and power for the cabinet to an Arabian system as the Egyptian and the Syrian – where both the government and the PLC are weak".<sup>213</sup>

Sartori points out that "the line that separates use and abuse is – in the case of referendums – a very fine line". In the most extreme cases, presidents have used it to submit to a referendum any bill rejected by parliament.<sup>214</sup> A referendum call under the 2005 proposal would require a ratification by the PLC – although the draft does not specify whether by an absolute or a two thirds majority. It might enable to bypass cabinet by going to the PLC and asking for a referendum, but this option would be of limited relevance if the cabinet is backed by a majority in the PLC. A deterrent for the president to actually resort to a referendum under this provision would be that the referendum would be considered binding as opposed to advisory, and the

---

<sup>212</sup> Harb, interview, 2005.

<sup>213</sup> Harb, interview, 2005.

<sup>214</sup> Sartori, *Comparative Constitutional Engineering*, 165.

president could risk losing. By contrast, the president's ability to act independently in states of emergency would have been reduced by this proposal. A suggested amendment to Art 98 would require that the president consult with the PLC speaker and the cabinet before issuing decrees to declare a state of emergency. Whereas the president under 2003 Amended Basic Law is empowered to call a state of emergency for 30 days, requiring a majority in the PLC for extending the emergency, the 2005 proposal would have obliged the president to consult with the PLC speaker and the cabinet before declaring the state of emergency in the first place.

As passed by the PLC, the 2005 amendment served to fix the term of the PLC and the presidency. By contrast, the rejected proposals would have introduced a number of mechanisms to trigger early elections due to a ministerial crisis, a voluntary resignation of the entire council, or the absence of quorum. In case of a ministerial crisis – that is, if the appointed prime minister proved unable to form a cabinet within the constitutional time limit, the president would have been provided with the option of asking the PLC to “to ratify a law that allows holding early elections within 90 days of that date” (new). In such cases, the PLC would be furnished with a countermove in asking the president to appoint a specific prime ministerial candidate to make a second attempt at forming a cabinet. Only after such an attempt, the PLC would be required to vote whether or not to dissolve itself. The law specifies a timeframe for these procedures.

Secondly, for reasons not mentioned in the proposal, the council could decide to resign by an absolute majority of its members. The decision would take form of a law. Thirdly, more than two members of the members of the PLC could request the president to call for early elections by decree in the case of absence of quorum or due to vacant seats in the PLC because of death or resignation. The proposals also would have provided the PLC with the option of extending their own term in cases of emergency where elections cannot be held on the set date. This would require a majority of two thirds of PLC in the form of a law. On the question of dissolution powers, Sartori argued that as a principle, presidential systems based on power separation as opposed to a system where the executive depends on parliamentary confidence, should not include dissolution rights to the president. Even so, dissolution rights have been awarded to the president in attempts at reinforcing presidential and semi-presidential regimes.<sup>215</sup>

Eventually, the PLC opted for a minimum solution. On 27 July they passed an amendment that set the term of the council and presidency to four years, with no openings for early elections. Instead of setting the number of PLC members to 88, the number of PLC members was now to be specified in the Law of Elections, as was the system of representation.<sup>216</sup> There might be several

---

<sup>215</sup> Sartori, *Comparative Constitutional Engineering*, 164-165.

<sup>216</sup> Butenschön and Volland, “Democracy in Conflict,” 66.

reasons why the 2005 proposals were rejected by the PLC. The proposals signaled growing concerns within the Fatah Central Committee and the PLO Executive Committee that the elections would not guarantee Fatah a comfortable margin in the PLC. Short of anticipating a Hamas victory, it still seems likely that they would favor dissolution powers as a tool to discipline a potentially unruly legislative assembly. Fatah parliamentarians would naturally be less inclined to accept such a solution. This might explain why the proposals were rejected.

Supporters of the proposals were motivated in part by the fear of losing influence after the coming PLC elections and voted as they were instructed by the Fatah leadership. Some were also in favor of the proposals because they were displeased with the performance of the sitting cabinet. Others based their support on personal interests. According to Harb, there were “promises for them to be head of institutions”.<sup>217</sup> He argues that “in Fatah there is no agenda [...] because everyone has personal issues [...] The beneficiaries from Arafat will be against strengthening Abu Mazen [Abbas] and give him more power.” Saleh argues on the other hand that Arafat’s beneficiaries will try to strengthen their position by supporting Abbas. Saleh was present under a PLC Legal Committee’s discussions of the proposals. He observes the following:

Arafat was not a person. He represented a class, beneficiaries. And these beneficiaries have not disappeared with him. They are there. And today, when I – we were talking about the amendments – I felt that this man [one of the lawmakers present] is really defending his cause by trying to give Abu Mazen [Abbas] the same rights, the same jurisdiction as Arafat. [...] They know their – not rights – but their privileges.<sup>218</sup>

Harb points out that some of the supporters of the proposals, like Sadi al-Krunz, and Abdul Karim Abu Salah, had also supported the weakening of the president in 2003. “After two years, they want to change the system. Two years is not enough to change your thoughts.”<sup>219</sup> Both Karim and al-Krunz have traditionally been close to Abbas and served as ministers in Abbas’ short lived cabinet.<sup>220</sup> Harb laments the personal nature of some of the conflicts that have shaped even Palestinian constitutional law: “In 2003 we amended the Basic Law because Arafat wanted Abbas to be prime minister. And when Abbas has become president, he wants to amend the Basic Law. Two amendments for one person. Why? [...] Is there one person in the Palestinian people?”<sup>221</sup>

### ***The 2005 proposals in light of the 2003 amendment***

Neither the proposals nor the rejection of them seem to reflect a conscious approach to the nature of the Palestinian political system. For instance, introducing a vice presidency into an already

---

<sup>217</sup> Harb, interview, 2005.

<sup>218</sup> Salah, interview, 2005.

<sup>219</sup> Harb, interview, 2005.

<sup>220</sup> Fishman, “A New Palestinian Cabinet.”

<sup>221</sup> Harb, interview, 2005.



conflict prone system appears to be an ad-hoc tactic to provide the president with an ally that would enhance his ability to undermine the prime minister, or the other way around. The preceding drafting process of new election law had been shaped primarily by a combination of personal interest on behalf of individual PLC members and partisan interests on behalf of Fatah. It seems reasonable to conclude that while the 2005 proposals were motivated by the need to bolster the presidency and provide the president with tools to dissolve an uncooperative parliament, the rejection of these proposals were motivated by PLC members who did not wish to grant the president these authorities. The desire to limit the presidency was part driven by concerns that such dissolution powers might be abused, and part by the desire to maximize power within one's own branch of government.

The 2005 proposals were part of a gradually accelerating breakaway from the 2003 amendment that reflected the changed political scene after the demise of President Arafat. Had the Basic Law been amended along the lines of the 2005 proposals, it would have turned the PA into a hybrid sort of semi-presidential system with a vice president alongside a prime minister. Such a system would not fit neatly into the presidential and semi-presidential categories as defined by Sartori. The proposals would have edged the system towards a stronger presidency, and were not concurrent with the 2003 reforms. The president would still be constitutionally impossible to question or impeach, but there would be ways of dismissing the parliament. One could for instance imagine a scenario where the largest party could force the parliament's dissolution in order to trigger new elections.

With hindsight, the proposals would prove strikingly relevant. In the events following the 2006 elections, President Abbas exercised his perceived constitutional prerogatives along the lines of a variety of earlier proposals, most significantly on the early PLO drafts and the 2005 proposals. For instance, in 2006, he called for a referendum, threatened to dissolve the parliament by calling for early elections and installed an emergency cabinet without PLC approval. This will be explored in depth in the last chapter of this thesis. For now, suffice it to say that the 2005 proposals along with the Oslo Accords and the PLO drafts for a Basic Law provide a "pool" of prerogatives for the president to draw on, whether they were in fact enacted by parliament or not. This seems to indicate a lacking commitment to decisions made. It also reveals the constraints posed on the PA by the international community, which at all times requires the cabinet to adhere to a specific political platform including recognition of Israel and nonviolence.

## SUMMARY PART I

When comparing the various constitutional drafts, laws and amendments, we see that Palestinian constitutional development has been influenced by external and domestic interests respectively. In the early stages of the drafting process, the PLO played a significant part, and consequently drafted proposals which awarded the PLO a crucial position, and the PLO chairman was endowed with broad powers in his capacity as PA president. The PLO's skepticism towards constitutional limitations is visible in the nonconstitutionalist nature of the document, which would have enabled a strong presidency while providing the PLC with only a vague and limited role. The PLC Basic Law was drafted by the Palestinian elected parliament and provided the parliament with a much stronger and defined role.

A strong presidency was in concord with international demands that required the PA to quell armed resistance by way of co-option or repression. This both required and generated executive centralization. Not until the security situation grew untenable from an Israeli point of view there were real demands on President Arafat to even pass the Basic Law. In response to the armed uprising in 2000, international society joined Palestinian constitutionalists in demanding institutional reform. At this time, Arafat had come to be seen as part of the problem, and no longer a moderate negotiating partner. A broad reform coalition agreed on a number of reforms to weaken the president and transfer the responsibility for guaranteeing security to the cabinet. The 2003 reforms included a constitutional amendment that provided the PA with a prime minister to share power with the president. While this had the potential to constitute a significant reform, the first prime minister resigned almost immediately as it proved very difficult for the cabinet to exercise power in line with the constitutional amendment.

The death of President Arafat and the decision of Hamas to enter the political institutions altered the political situation, and the reform coalition gradually dissolved along with the momentum for reform. Pending the second PLC elections, proposals were made to introduce the possibility of dissolving parliament and refurnishing the presidency with powers that had been removed in 2003. The effect on this on the Basic Law itself was minimal, most likely because the Fatah parliamentarians did not realize how precarious their positions were. Even though the 2005 proposals were rejected, their contradictions with the 2003 reforms mirror how the new political context bred new strategies. While the political situation did not generate significant change in the Basic Law itself, it did affect the electoral system and the 2005 Law of Elections. The resulting electoral victory by an opposition party was unprecedented in the Arab world, but this was an unintended outcome of political deliberations, and cannot be seen as a significant reform.

## PART II: CABINET POWER AFTER THE 2003 REFORM

*The constitution says that the internal security apparatus must be under control of the cabinet office or the interior minister. I believe this is clear.*

- Prime Minister Mahmoud Abbas

### 5. 2003-2007: Reforming the “security chaos”

This part of the thesis is related to the question of whether the Basic Law has been able to influence political outcomes. I have chosen to limit the discussion to the areas of security and foreign affairs as these were centerpieces of the 2003 reform effort. In the field of security, the Palestinian cabinet is challenged from within by the various armed factions and from without by Israeli military incursions. The PA’s ability to maintain a monopoly of power lies at the heart of all agreements with Israel and is prerequisite to gain international legitimacy for the PA.

The Palestinian security apparatus had initially been set up as a part of the Oslo Accords with the objective of assimilating and repressing the armed Palestinian factions, thereby guaranteeing Israeli security.<sup>222</sup> Arafat’s divide and rule-strategy, and the absence of a clear security doctrine contributed to what political scientist Roland Friedrich at PASSIA (Palestinian Academic Society for the Study of International Affairs) described as a “chaotic scenario that is characterized by the absence of any clear differentiation between the various agencies, massive functional overlaps, and the blurring of the distinction between the spheres of police and military”.<sup>223</sup> In order to emasculate Arafat, a plan was conceived to consolidate the security forces under the control of the Ministry of Interior.<sup>224</sup>

In April 2003, “A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict” was presented to the Palestinians by the Middle East Quartet.<sup>225</sup> The so-called Roadmap stated that the security forces were to report to the Ministry of Interior, while the 2003 amendment of the Palestinian Basic Law placed the area of security within the domains of the cabinet. The subsequent 2003 amendment of the Basic Law introduced a prime minister specifically so that he could compete effectively with the president and to create a stronger cabinet. In April 2003, Abbas was sworn in as the PA’s first prime minister. From its inception,

---

<sup>222</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 23.

<sup>223</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 35.

<sup>224</sup> Friedrich, interview, Ramallah, 15 July 2005.

<sup>225</sup> *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict* Washington, 30 April 2003. Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm> (last accessed 20 January 2008).

Abbas' cabinet was ridden by conflicts with Arafat over who was to be interior minister, and what would be the powers of the Ministry of Interior. This chapter takes on whether the Basic Law was able to affect political outcomes in the field of security. More specifically, was the “empowered reform cabinet” and the interior ministers able to exercise their powers as ascribed in the Amended Basic Law?

### ***Constitutional framework***

Originally, the Palestinian security forces were defined by the Interim Agreement as “The Palestinian Police”. Art XIV.3 stated that “Except for the Palestinian Police and the Israeli military forces, no other armed forces shall be established or operate in the West Bank and the Gaza Strip”. Annex I Art II.1a stated that “The Palestinian Police is the only Palestinian security authority”. The Palestinian police was to assume responsibility for public order and internal security of Palestinians, whereas Israel was to carry the responsibility for external security (Art VIII. 1a). Art IV outlined the duties and functions of the Palestinian police. Art IV.2a stipulates that the Palestinian Police was to “consist of one integral unit under the control of the council” and to be organized in six branches. All members were to be subordinated to one central command in each district. In addition, the Police force was to have a Palestinian Coastal Police unit. The total number of policemen were not to exceed 30 000, 12 000 in the West Bank, and 18 000 in Gaza. The PLC Basic Law simply stated that “the President is the Commander-in-Chief of the Palestinian forces”, meaning the security forces and the police (Art 55). Moreover, “Security Forces and the Police shall be regulated by law” (Art 75.2).

The Roadmap called for a restructuring and modernization of the Ministry of the Interior. The Preventive Security Services, the Police and the Civil Defense were to be “attached” to the Ministry of the Interior, “so that this Ministry will be in charge of all matters relating to internal security according to the law”. Furthermore, the role of the Ministry of the Interior was to be “reactivated”. The Roadmap explicitly stated that “All Palestinian Security organizations are consolidated into three services *reporting to an empowered Interior Minister*” (emphasis added). Parsons points out that the amendment introduced a division of labor between president and the cabinet, but without clearly delimiting the respective powers of the two. The 2003 amendment retained the president as commander-in-chief of the Palestinian forces (Art 39). In addition, Art 69.7 stated that the cabinet is to “be responsible for maintaining public order and internal security”. The 2003 amendment came to be interpreted as giving the president the responsibility for “national security”.<sup>226</sup> This argument was widely used to justify support for the Presidential

---

<sup>226</sup> Parsons, *The Politics of the Palestinian Authority*, 301.

Guard after the Hamas electoral victory in 2006, when the Ministry of Interior came under the leadership of a Hamas cabinet. To my opinion, this dichotomy seems rather constructed, as the mandate of the Palestinian security forces was not intended to reach *beyond* internal security.

### **Legislative efforts**

The Basic Law required additional legislative work in order to effectively define the distribution of competencies between the president and the cabinet in security matters and to set down procedures for parliamentary oversight. Art 84.2 of the Amended Basic Law states that “The Law shall regulate the Security Forces and the Police”. In the 1990s, the Law for the Civil Defense and other laws related to special aspects of security, such as the Law of Public Meetings and the Law on Firearms and Ammunition were approved. However, there is no basic security legislation which deals with the security sector as a whole.

In 2005, the Authority started work to on an overarching legislative framework for all the security services, but the drafting process was badly coordinated. Azmeh Shueibeh represented the political movement Fida<sup>227</sup> in the first PLC and was member of the PLC Legal Committee. According to Shueibeh: “We [the PLC] finished at least some of the laws while the cabinet is still preparing others... The government is not united. [...] The president and the prime minister are not working together by a homogenous policy on this issue.”<sup>228</sup> Draft laws were brought in by the security agencies themselves, and were not necessarily linked to the national security law in the sense that duties, functions and command structures might overlap, or the drafts may contradict each other.<sup>229</sup> These drafts were submitted by the agencies in an attempt to protect their influence and supporting groups.<sup>230</sup> According to Shueibeh, the intelligence worked to convince the PLC that the intelligence apparatus was to be accountable to the PA president.<sup>231</sup> Simultaneously, the president was reportedly preparing a different draft that would render all agencies accountable to the prime minister. Due to factional strife, the work was not completed.

The first PLC did manage to pass a Pensions Law. The aim of the Pensions Law was political and it was enacted specifically to get rid of old security commanders.<sup>232</sup> The remaining security laws were still not completed when the term of the first PLC expired. After the

---

<sup>227</sup> Fida is a reformist movement which split from the DFLP in 1990. Fida advocates democratization in the Palestinian arena and focuses on a party system that reflects political pluralism and democracy. See PASSIA, “Dictionary of Palestinian Political Terms,” <http://www.passia.org/diary/Palestinian-Dictionary-Terms.htm#f> (last accessed 11 February 2008).

<sup>228</sup> Azmeh Shueibeh, interview, Ramallah, 16 July 2005.

<sup>229</sup> Friedrich, interview, 2005.

<sup>230</sup> Friedrich, interview, 2005.

<sup>231</sup> Shueibeh, interview, Ramallah, 16 July 2005.

<sup>232</sup> Friedrich, interview, 2005; and Ashraf Ajram, interview, Gaza, 5 July, 2005.

inauguration of the second and Hamas dominated PLC in 2006, the PA faced international sanctions and internal strife. A wave of public strikes in August 2006 caused a halt in parliamentary work, especially the drafting of security sector laws, and also in other sectors. Some continued their work, but not in issues which were related to security. The process of legal reform vis-à-vis the security sector ground to a halt.<sup>233</sup>

The need to control the security forces had been at the heart of the national consensus document that had been drafted during the summer of 2006, the so-called Prisoner's Document.<sup>234</sup> The Prisoner's Document was an inter-factional document drafted by Palestinian leaders in Israeli jails and was supposed to form the foundation for a political program for a national unity cabinet. Among the issues that were addressed in the Prisoner's Document, security was paramount. The document refers to "The need to reform and develop the Palestinian security system in all its branches in a modern manner" and calls for an end to "the state of security chaos and lawlessness, ending the public show of arms and parades and confiscating any weapons that harm the resistance and distort its image or those that threaten the unity of Palestinian society". The need to regulate the security forces was reiterated in the Mecca Agreement, which was negotiated between Fatah and Hamas in February 2007 and paved the way for a national unity cabinet.<sup>235</sup>

### ***Contesting competencies***

One of the fields where the competition between the president and the cabinet played out was in the National Security Council (NSC). After the 2003 amendment the NSC provided the president with an arena where he could exert his influence and exercise his power as Commander in Chief alongside the prime minister. The NSC was established as part of the 2003 reform effort, but had an historical precursor in the so-called Higher Council of National Security (HCNS). From the establishment of the PA, the security reported directly to the president. On the organizational level, local security chiefs reported to the governors, who were appointed by the president, and who reported directly to him. In theory the various bodies were to be subordinate to the HCNS, consisting of the security chiefs and the president himself. In reality, they all reported directly and separately to Arafat.<sup>236</sup> Revamping and downsizing the HCNS was part of the reform effort, and the HCNS was replaced by the NSC. This organ was to consist of the president, the prime minister and the ministers of finance, interior and foreign affairs, a member of the PLO Executive

---

<sup>233</sup> Friedrich, e-mail, 28 January 2007.

<sup>234</sup> *National Conciliation Document of the Prisoners*, second version, June 28, 2006. JMCC, <http://www.jmcc.org/documents/prisoners2.htm> (last accessed 19 January 2008).

<sup>235</sup> *The Mecca Agreement*, 8 February 2007. JMCC, <http://www.jmcc.org/documents/meccaagree.htm> (accessed 19 January 2008).

<sup>236</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 43; Parsons, *The Politics of the Palestinian Authority*, 302.

Committee, and the heads of the various security forces. The NSC was to oversee the implementation of security sector reforms, but was not to have any direct command role.<sup>237</sup>

Initially, Arafat had stalled the activation of the NSC, but after the appointment of the prime minister in 2003, he found it to be an efficient tool to undermine the authority of the cabinet and the interior minister.<sup>238</sup>

During the 2002-2003 reform wave it became clear that the Ministry of Interior would be a potentially powerful position. Until June 2000, Arafat had reserved this portfolio to himself. In order to placate the international community, he then relinquished the portfolio to Fatah returnee and former commander of the Palestine Liberation Army Abdul Razzaq al-Yahiya. Beginning with Al-Yahiya, a series of interior ministers would find that they were unable to exert authority over the security apparatus. Attempts at making senior appointments, fire powerful personnel or imposing financial discipline were simply ignored. When Abbas became prime minister in 2003, Arafat asked him to appoint Hani al-Hassan as interior minister in his 2003 cabinet. Instead of complying with the president's wishes, Abbas decided to take this portfolio himself. In addition, Abbas appointed Mohammed Dahlan as state minister for security and tried to transfer full control of the security apparatus to him.<sup>239</sup> As member of the Fatah Revolutionary Council and former head of the Preventive Security Service in Gaza, Dahlan had established himself as a powerful figure. As minister for security, he was for all practical purposes given control over the Ministry of Interior which was headed by Prime Minister Abbas in his capacity as minister of interior. Dahlan immediately started implementing structural reforms, made a series of appointments and started rebuilding the police and Preventive Security forces. In order to counter the influence of Dahlan and Prime Minister Abbas, Arafat decided to make use of the NSC.

The NSC started giving instructions to the heads of the security forces – and to Dahlan – to prepare for the Israeli withdrawal from Gaza.<sup>240</sup> A group of Arafat loyalists also demanded that some of the security powers of Dahlan be transferred to the NSC. In another attempt at subverting Dahlan and by extension Prime Minister Abbas, Arafat in August 2003 appointed Jibril Rajoub as his National Security Adviser. Rajoub had been head of the Preventive Security Forces in the West Bank and was reportedly on bad terms with Dahlan. On Arafat's insistence, the NSC temporarily assumed the function of reorganizing and commanding the security forces. This arrangement was cemented after the resignation of Abbas and the appointment of Qureia as prime

---

<sup>237</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 46.

<sup>238</sup> Parsons, *The Politics of the Palestinian Authority*, 302.

<sup>239</sup> Parsons, *The Politics of the Palestinian Authority*, 171.

<sup>240</sup> Arnon Regular, "Arafat trying to undermine Dahlan's security powers," *HaAaretz*, 10 July 2003, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=316409&contrassID=1> (last accessed 18 November 2007).

minister and Hakam Balawi as interior minister. In November 2003, the Ministry of Interior officially lost its jurisdiction in security matters to the NSC, and the heads of the Civil Police and Preventive Security were ordered to report to Arafat in his capacity as head of the NSC. The NSC is not mentioned in the Basic Law, and the Basic Law does not allow for questioning of the president. In lack of an overarching National Security Law, the NSC and the security apparatus remained outside the scope of parliamentary control.<sup>241</sup> The NSC remained operative until Arafat's demise in November 2004. During that time, they held more than a dozen meetings, but did not achieve anything of effect.<sup>242</sup> After Arafat was succeeded by Abbas, the NSC remained defunct due to problems between President Abbas and Prime Minister Qureia. According Harb, "the council is asleep, because the two haven't agreed".<sup>243</sup>

After becoming president in February 2005, Abbas initially sought to continue the 2002-2003 reform efforts. On 14 April 2005, he issued a presidential decree to merge the various security services to come under the authority of three branches: the National Security Forces, the Interior Ministry, and the General Intelligence Agency. He also decided to re-establish the NSC. When the Basic Law was being amended in 2005, one of the rejected proposals included the establishment of a NSC "with the task of deciding on security policies and strategies with its works to be organized and defined by a law". The NSC was to be headed by the president with the prime minister was to assume the post of deputy head. When the proposal was rejected, Abbas established the NSC by decree on 25 September 2005.<sup>244</sup> The move was criticized by Harb and Shikaki. They argued that the president "sought to bypass normal legislative process while dramatically changing the system of government" by giving "the president control over NSC and thereby all aspects of security", while "the Basic Law clearly stipulates that law and order and internal security are the responsibilities of the cabinet".<sup>245</sup> They further warn that the minister of interior "may find himself no longer accountable to the PLC". They argue that:

The timing of the request by Abbas and some Fateh parliamentarians, just before the parliamentary elections, raises serious concerns that Fateh and the president, fearing a strong Hamas showing in the January 2006 elections, are trying to weaken the legislature and strengthen the president in a desperate attempt to maintain Fateh's dominance over the political system.<sup>246</sup>

However, it has also been argued that the NSC should be reactivated and broadened as part of a comprehensive security sector reform that includes professionalization of the command level and

---

<sup>241</sup> Friedrich, *Security Sector Reform in the Occupied Palestinian Territories*, 45-48.

<sup>242</sup> Harb and Shikaki, "Towards a more open and inclusive political system," 3; and Harb, interview, 2005.

<sup>243</sup> Harb, interview, 2005.

<sup>244</sup> Harb and Shikaki, "Towards a more open and inclusive political system," 1.

<sup>245</sup> Harb and Shikaki, "Towards a more open and inclusive political system," 4.

<sup>246</sup> Harb and Shikaki, "Towards a more open and inclusive political system," 2.



integration of all partisan militias and disarmament of local gangs.<sup>247</sup> In such an effort, the NSC is envisioned as the “supreme arbiter of security policy”.<sup>248</sup> After Abbas reestablished the NSC in 2005, it did meet on occasions before the second PLC elections, but after Hamas assumed power, the president did not make use of the restructured NSC. In the words of Hamas Interior Minister Said Siyam (2006-2007): “President Abbas is the head of the National Security Council but since we assumed office he has not convened it even once. In fact, he has not once chaired a cabinet meeting even though it is his government.”<sup>249</sup>

Instead of exerting authority through the NSC, president Abbas reinforced his own Presidential Guard, whose original mandate was to protect the president. The Presidential Guard was made a separate force in 2006, and after the January 2006 elections, it became part of an internationally supported effort of bolstering president Abbas against Hamas.<sup>250</sup> The Presidential Guard was reportedly to monitor the borders between the Palestinian areas to Egypt and Israel, and to be used to stop Palestinians from launching home-made projectiles at Israeli towns and cities. Israel has indirectly supported the Presidential Guard by allowing it to import weapons from Jordan and Egypt, while the USA and EU supported the Presidential Guard with material support such as training programs and equipment.

Like his predecessors, Interior Minister Said Siyam was unable to control the security apparatus. The presidency made the security forces directly subordinate to the presidency and not the Ministry of Interior, contrary to what Abbas had demanded when he himself was prime minister. In March 2006, the Abbas appointed a Director General for security, specifically to restrict the security powers of the interior minister.<sup>251</sup> After realizing that the cabinet would be unable to assert their authority over the security forces via the Interior Ministry, Siyam announced the establishment of a parallel security force, the Executive Support Force in April 2006.<sup>252</sup> The Executive Force was built mostly from members of the Hamas armed wing, the al-Qassam Brigades, but it included some members from allied militant factions. Hamas’ armed wing, the al-

---

<sup>247</sup> ICG, “After Mecca: Engaging Hamas,” ICG Middle East Report, No. 62, 28 February 2007, [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/62\\_after\\_mecca\\_engaging\\_hamas.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/62_after_mecca_engaging_hamas.pdf) (last accessed 20 January 2008) ii.

<sup>248</sup> ICG, “After Mecca,” ii.

<sup>249</sup> ICG, “After Mecca,” 17.

<sup>250</sup> Friedrich, e-mail, January 2007.

<sup>251</sup> Palestinian Independent Commission For Citizens' Rights (PICCR), “The Status of Palestinian Citizens' Rights During 2006,” 12<sup>th</sup> Annual Report, Chapter 1: The Executive Authority (Ramallah: April 2007), [http://www.piccr.org/dmdocuments/AnnualReports/2006/eng/chapter\\_1.pdf](http://www.piccr.org/dmdocuments/AnnualReports/2006/eng/chapter_1.pdf) (last accessed 19 January 2008), 39. All chapters are available from: [http://www.piccr.org/index.php?option=com\\_content&task=view&id=163&Itemid=189&lang=en](http://www.piccr.org/index.php?option=com_content&task=view&id=163&Itemid=189&lang=en) (last accessed 20 February 2008).

<sup>252</sup> ICG, “After Mecca,” 11.

Qassam Brigades, are estimated to 15 000 members. It remained uncertain to what extent the Brigades overlapped with the Executive Force.<sup>253</sup>

According to Siam, the Executive Force was designed to strengthen existing security forces, as they were professionally and politically incapable of exercising their mandate.<sup>254</sup> However, Fatah saw the Executive Force mainly as an instrument for internal confrontation.<sup>255</sup> Fatah spokesmen argued that Hamas sought to “set up a loyalist presence within the establishment” and “establish [Hamas] as a legitimate security force through which it can implement its own programs [in] an attempt to circumvent the existing security establishment and provide legal cover for the activities of the Al Qassam Brigades, especially on the internal front”.<sup>256</sup> Fatah and President Abbas strongly opposed the establishment of the new force and issued a decree where he stated that the new force was illegal and ordered all security chiefs to consider the cabinet’s decision as if it had never been made. In response, the Ministry of Interior declared its intention to increase the Executive Force to 12 000 members.<sup>257</sup> During the spring, Abbas deviated from his earlier assertions that the Executive Force was illegal, and on 15 June, he formally incorporated the militia into the Palestinian police forces.<sup>258</sup> On the ground, however, relations remained tense. Talks about what to do with the Executive Force remained largely inconclusive, and it was in fact not integrated with the other forces as demanded by the president and Fatah. Friedrich observes that in spite of sporadic cooperation with regard to law and order, “it would be difficult to say that there is a real working relationship between the Executive Force and the Fatah related forces”.<sup>259</sup>

The legal basis for the Hamas led Executive Force has been subject to different interpretations. The minister of interior refers to the authority of the cabinet over law and order. The other interpretation is that no Palestinian institution can set up security forces without the approval of the president, who is the supreme authority according to Art 39 of the Basic Law, stating that he is the commander-in-chief of the armed forces.<sup>260</sup> It has also been argued that the

---

<sup>253</sup> *Reuters AlertNet*, “FACTBOX: How rival Palestinian forces stack up,” 16 May 2007, <http://www.alertnet.org/thenews/newsdesk/L112394827.htm> (last accessed 18 November 2007).

<sup>254</sup> As quoted by ICG, “After Mecca,” 11.

<sup>255</sup> Friedrich, e-mail, 2007.

<sup>256</sup> Tawfiq Abu Khusa, Fatah spokesman and former Interior Ministry spokesman, as quoted in ICG, “After Mecca,” 11.

<sup>257</sup> *Maan*, “Hamas-affiliated Executive Force decides to raise its membership to 12000,” 7 January 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=18466> (last accessed 14 May, 2007). By May 2007, it’s size was estimated to 6 000 men, see *Reuters*, “How rival Palestinian forces stack up.”

<sup>258</sup> The Washington Institute for Near East Policy, Mohammed Yaghi, “Abbas, Hamas, and the Referendum Trap,” Policy Watch #1116, 22 June 2006, <http://www.washingtoninstitute.org/templateC05.php?CID=2481> (last accessed 18 January 2008).

<sup>259</sup> Friedrich, e-mail, 2007.

<sup>260</sup> Friedrich, e-mail, 2007.

2003 cabinet is responsible for internal security, whereas the president under Art 39 is responsible for national security.<sup>261</sup>

While the Executive Force was run by the interior, it was not at all clear to what extent the Presidential Guard is accountable to parliament, the cabinet and the judiciary. Friedrich points out that: “In the Basic Law, there are provisions as to how the PLC can oversee the performance of the government, but with regard to the president the terms of accountability are less clear.”<sup>262</sup> Hamas’ forces represented a tradition of armed resistance, whereas the Fatah dominated security structures were established by the Oslo Accords with the objective of fighting violence and terrorism. These forces have also been involved in crackdowns on Hamas. When Hamas took power, the Presidential Guard was estimated to about 2500 men with a stated ambition to double in size.<sup>263</sup> The decision by the US, EU and Israel to directly or indirectly support the Presidential Guard was legitimized by the listing of Hamas as a terror group by both USA and the EU.

After the dissolution of the first Haniyeh Cabinet, former Interior Minister Siam talked to *Maan News Agency* about his time as minister. Echoing the defeat of all his predecessors, he stated bitterly: “I did not fail, they made me fail. [...] I was not given the chance to work properly and that is why nobody can judge if I succeeded or if I failed.”<sup>264</sup> On 17 March 2007, the second Haniyeh Cabinet – the so-called National Unity Government – was granted confidence by the PLC, and Hani al-Qawasmeh (Independent) was appointed interior minister. The Mecca Agreement included the resurrection of the NSC as “a higher national security council that represents the terms of reference to all security services”. The agreement further tasks the PLC with finalizing the law pertaining to this council. Al-Qawasmeh had previously worked as a bureaucrat in the Ministry of Interior, and he was appointed as nonpolitical figure. However, after only a few months later, the unity cabinet collapsed due to a military takeover by Hamas’ Executive Force in Gaza and the Fatah dominated National Security Forces in the West Bank.

The events that led to the collapse of the National Unity Cabinet are too complex for a thorough outline. Its prelude, however, followed a familiar pattern. On 18 March, the day after the formation of the unity cabinet, Abbas appointed Dahlan as his national security adviser with enhanced powers.<sup>265</sup> As chief of preventive security in Gaza, Dahlan had masterminded a series of crackdowns on Hamas in the 1990s and was seen as the man chosen by the USA to lead a

---

<sup>261</sup> Parsons, *The Politics of the Palestinian Authority*, 301.

<sup>262</sup> Friedrich, e-mail, 2007.

<sup>263</sup> Reuters, “How rival Palestinian forces stack up”.

<sup>264</sup> *Maan*, “Said Siyam reflects on his time as minister of the interior,” 19 March 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=20452> (last accessed 15 May 2007).

<sup>265</sup> ICG, “After Gaza,” ICG Middle East Report, No. 68 (Amman: 28 February 2007), [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/68\\_after\\_gaza.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/68_after_gaza.pdf) (last accessed 20 February 2008), 8.

campaign to reverse the 2006 elections. Meanwhile, on 10 April, the U.S. Congress authorized a 60 million dollar package to improve the state of Palestinian President Abbas' security staff, the Presidential Guard.<sup>266</sup> The funds could be used for basic and advanced training, nonlethal equipment, upgrade facilities, capacity building and technical assistance and the office of Abbas' national security advisor. Hamas interpreted the appointment of Dahlan to this post as a signal of Fatah's lacking commitment to the Mecca Accords and their intent to engineer the Unity Cabinet's failure and by extension force new elections for the PLC.

On 14 April 2007, Fatah and Hamas endorsed a security plan presented by al-Qawasmeh to enforce a unified command within the security forces. Key Fatah lieutenants ignored the plan. On 11 May, Dahlan's ally and newly appointed head of Preventive Security in Gaza, Rashid Abu Shbak, deployed security forces on the main roads of northern Gaza without consulting al-Qawasmeh. Following this incident, al-Qawasmeh chose to resign, stating his lacking authority to fulfil his mandate due to insubordinate and uncooperative commanders. In an interview with ICG, he stated that: "I reached the conclusion that the whole security situation is not being dealt with seriously."<sup>267</sup> After the military takeover in Gaza by the Executive Force, Prime Minister Ismail Haniyeh and the National Unity Cabinet were dismissed on 14 June, and emergency cabinet under former minister of finance, Salam Fayyad (Third Way<sup>268</sup>) was installed by presidential decree. On 23 June 2007, Abbas dissolved the NSC.<sup>269</sup>

### ***Security developments in light of the 2003 amendment***

The 2003 amendment was part of a broader reform effort that aimed to redistribute power over the security apparatus and consolidate the various forces under the Ministry of Interior. However, the security chiefs and the president joined forces in order to render the 2003 amendment cosmetic. The 2003 reform was immediately counteracted by President Arafat and loyalists in the security forces who preferred to report directly to the president. They managed to transfer power from the cabinet to the newly established NSC, which was not subject to any law and could not be held accountable. The 2003 Roadmap had primarily been a response to the violent second intifada that

<sup>266</sup> *BBC News Online*, "US Congress approves Abbas funds," 10 April 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6542379.stm](http://news.bbc.co.uk/2/hi/middle_east/6542379.stm) (last accessed 18 November 2007).

<sup>267</sup> Former interior minister Hani al-Qawasmeh as quoted in ICG, "After Gaza," 9.

<sup>268</sup> Founded and headed by Salam Fayyad. The Third Way is part of the so-called third current within Palestinian politics and aims to represent an alternative agenda to that of Fatah and Hamas. Further details in Martin Bergsbakk Holter, "Al-Mubadara - Third Current Politics of the Second Intifada: Remobilizing politics in a de-powered Palestinian Authority" (unpublished Master Thesis, Department of Political Science, University of Oslo, 2007), [http://www.duo.uio.no/publ/statsvitenskap/2007/60310/masteroppgaven\\_martinholter.pdf](http://www.duo.uio.no/publ/statsvitenskap/2007/60310/masteroppgaven_martinholter.pdf) (last accessed 11 February 2008), 100-101.

<sup>269</sup> The Chairman of the PLO and the PNA President, *Decree no. ( ) of 2007* on the dissolution of the NSC. JMCC, <http://www.jmcc.org/goodgovern/07/eng/presidentdecrees07.htm#dec23jun> (last accessed 4 February 2008).

Israel and the USA did not feel that Arafat made a sufficient effort to suppress. The NSC did not emerge as an arena where the president and the prime minister cooperated. Instead, it remained an ad hoc instrument for the president to subvert the cabinet. The real power over the security apparatus remained with the security chiefs themselves, and with an unaccountable president. In other words, power was not redistributed, and the cabinet was not able to assert itself as an alternative center of power. In spite of the reform attempts, the security sector became increasingly fragmented into a host of formal and informal security orders. The proliferation of weapons and forces came to be known as the *falatan*, Arabic for «security chaos» and «lawlessness».<sup>270</sup> The security chaos caused widespread internal concern as ordinary Palestinians were caught in the crossfire between the factions. In the words of Khalil Shaheen, head of the Economic and Social Rights Unit at the Palestinian Centre for Human Rights (PCHR) in Gaza, “it was something like Chicago. Everywhere you had shooting”.<sup>271</sup>

After the 2006 elections, the international community abandoned the 2003 reforms altogether in their effort to isolate the Hamas cabinet. The decision by the international community to support President Abbas and the Presidential Guard contradicted the stated aims of previous reforms. This reflects the diverging agendas as to what reform really is. Security sector reform can be seen as an effort to enhance accountability and transparency. However, if the number one priority is to have a strong Palestinian security apparatus that can clamp down on armed resistance, the issue of accountability becomes secondary. This obstructs Palestinian reform efforts. In the words of Friedrich:

Take for example of the institution of the prime minister: The post of the prime minister was created in 2003 to sideline Arafat. The idea was to strengthen the cabinet and weaken president, to take authority from Arafat. In this context, responsibility for internal security was given to the minister of interior. That had always been a demand by Palestinian reformers, and it became a real option when it was put on the international agenda. Now with Hamas in power, there is external pressure to do the opposite, to take authority away from the government and the prime minister.”<sup>272</sup>

In neither redistributing power nor making power subject to a popular mandate the 2003 reform did not amount to a significant security reform. The opposite of significant reform would be cosmetic reforms, which according to Ottaway are specifically designed to provide the impression of reform, while at the same time preventing reform.<sup>273</sup> Arafat loyalists never committed to the reform in the first place and intended for it to be of minimal consequence. Because Arafat played

---

<sup>270</sup> The term appeared in several of my interviews and was explained to me by my interpreter in Gaza.

<sup>271</sup> Khalil Shaheen, interview, Gaza, 3 July 2005.

<sup>272</sup> Friedrich, e-mail, 2007.

<sup>273</sup> Ottaway, “Evaluating Middle East Reform,” 11.

a pivotal role in promoting a reform that he did not intend to adhere to, the reform was in one sense cosmetic. That does not preclude that the reform coalition comprehended reformists who were genuinely concerned with reigning in the security apparatus. They were, however, unable to impose their vision on the security apparatus as the international community first lost interest and then proceeded to reverse the reform. The logic of Amended Basic Law in its quality as a legal text no longer conformed to the logic that had motivated the various groups that constituted the reform coalition. The reform coalition that had coalesced around the need to weaken Arafat gradually unraveled.

One of the keys to successful constitutional reform lies with the PLC, who has not been able to make use of the provisions in the Basic Law to play its full role. The prisoner's document expressed a mutual understanding that the various armed forces and the security apparatus needed to be coordinated, and that legislation was needed in this effort. The document called for the PLC "to continue issuing laws that regulate the work of the security apparatus in its various branches and to work towards issuing a law that bans the exercise of political and partisan action by members of the security services". The broad representation of the various factions within the second PLC represented an unprecedented potential for new security legislation to be implemented, had this effort been encouraged. Such a supporting legal framework might have served to impose parliamentary oversight over the security apparatus. This would have enabled the reform to be significant according to Ottaway's criteria that reform should make power subject to a popular mandate.<sup>274</sup> Domestically, this was seen as a pressing issue. In the long term, however, power has been retransferred to the Presidency, which the PLC cannot hold accountable under the Basic Law.

---

<sup>274</sup> Ottaway, "Evaluating Middle East Reform," 10.

*Sometimes you should forget the law – the Basic Law and try to have a compromise with Farouq Qaddoumi.*

- Qaddura Fares

## **6. 2003-2007: Reforming diplomacy**

The Oslo Accords had imposed strict limitations to the jurisdiction of the PA. One area explicitly exempt from the PA's competency was the field of negotiations and foreign affairs. However, a less publicized aspect of the 2003 reforms was the attempt to restructure the Palestinian diplomatic corps. This was done by working around the restrictions of the Oslo Accords in establishing a Palestinian ministry of foreign affairs and attempting to redress and professionalize the diplomatic corps under the cabinet and a newly appointed minister of foreign affairs.

While the effort to reform the security forces has been subject to comprehensive research as well as journalistic coverage, the effort to reform the field of diplomacy is less known. The articles referring to foreign affairs in the Basic Law were not specifically amended in the 2003 amendment. Nonetheless, when Abbas stepped down as prime minister in the fall of 2003, he dedicated much of his resignation speech to the PLC to share his frustration over the cabinet's inability to exert influence in this field. Initially a main reason for this had been the overlap between the PA and the PLO and the failure of President Arafat to resolve the power struggle that arose between the cabinet and the PLO political office in Tunis. As president, Abbas tried to rectify this neglect, but the effort was shelved as Hamas was swept to power by the 2006 parliamentary elections. At this point, the international community flatly refused to deal with the Palestinian Ministry of Foreign Affairs. Referring to the Oslo Accords, the donors stated that they would only deal with Abbas in his capacity as PLO chairman.

In explaining these developments, we gain a broader understanding of the 2002-2003 reforms and the forces that have affected the ability of the Basic Law to affect political outcomes. This chapter concerns the impact of the reforms on the organization of Palestinian foreign affairs and the distribution of competencies between the PLO, the president and the cabinet in the field of diplomacy. The question is what role the cabinet has been able to play in the field of diplomacy, and how this plays into the role of the PLO. I will first give an outline of the formal distribution of authorities between the PLO and the PA. I will then present realities on the ground and how the reforms attempted to deal with this situation. Lastly, I will give an account of the experiences of the foreign minister under the first Haniyeh Cabinet in light of the stated goals of the 2002-2003 reforms.

## ***Constitutional framework***

The PA was not actually to build new institutions from scratch, but to integrate the various institutions that had emerged inside and outside the occupied territories. In exercising their functions, PA officials could claim a variety of historical sources or antecedents on which to draw.<sup>275</sup> The Oslo Channel helped Arafat, Fatah and the PLO in consolidating their grip on the nascent institutions.<sup>276</sup> On the face of it, the division of labor between the PA and the PLO was relatively clear. The PA was in itself the result of an agreement between the PLO and Israel. The PLO was to maintain its role as the sole representative of the Palestinian people inside and outside of the PA, whereas the PA was to build institutions and administer the territories in the interim period. From that would follow that the PLO, and not the PA, was mandated to negotiate a permanent deal. The supreme body of the PLO is the Palestine National Council (PNC), which is the parliament of the PLO. Between 1964 and 1998, the PNC held 22 sessions, but has not convened since then.<sup>277</sup> This body was never elected, and the holding of PNC elections was a key commitment in the Cairo Declaration and the Prisoner's Document. The PNC has maintained roughly the same composition since it was established in 1964. Between PNC sessions its authority is vested in the PLO Central Council. The Central Council has in turn conferred upon the PLO Executive Committee the right to monitor the negotiations with Israel, but retained the right to ratify all agreements.<sup>278</sup>

The mandate given to the PA by the 1995 Interim Agreement between Israel and the PLO specifically excludes “foreign relations”. The PA was to abstain from “the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions” (Art IX.5a). However, the Interim Agreement stipulates that “the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the council” in the following cases: economic agreements under the provisions of the Interim Agreement, “agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the council”, “agreements for the purpose of implementing arrangements for the provision of assistance to the council”, or “agreements for the purpose of implementing the regional development plans” laid out in the Declaration of Principles or “agreements entered into the framework of the multilateral negotiations”, and cultural, scientific and educational agreements” (Art IX.5a, b).

---

<sup>275</sup> Brown, *Palestinian Politics after the Oslo Accords*, 8.

<sup>276</sup> Parsons, *The Politics of the Palestinian Authority*, 43.

<sup>277</sup> See Parsons, *The Politics of the Palestinian Authority*, 323 for a survey of all PNC sessions.

<sup>278</sup> Parsons, *The Politics of the Palestinian Authority*, 129.



Early drafts of the Basic Law specifically stated that the Basic Law was not to “affect the powers and duties of the Palestine Liberation Organization and its organs including its powers to represent the Palestinian people in foreign and international relations and relations with foreign government[sic.] international organizations” (Art 103, 1994 PLO draft; and Art 117, 1995 PLO draft). Neither the 2002 PLC Basic Law nor 2003 Amended Basic Law addressed the issue of negotiations, but Art 40 in the Amended Basic Law states that:

The President of the National Authority shall appoint and terminate the services of the National Authority’s delegates to foreign countries, international organizations and foreign agencies. The President shall accept the credentials of foreign delegates to the Palestinian National Authority.

Juxtaposed with Art IX.5, forbidding “the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions” it seems that the Basic Law’s Art 40 would contravene the Interim Agreement on this point. Butenschøn and Vollan argue that:

“The responsibility for negotiations with Israeli continues to be located at the office of the president, not in his capacity as president of the PA, but in his capacity as the Chairman of the PLO. Like his predecessor Yasser Arafat, Mahmoud Abbas holds both positions, but it is only as PLO leader that he is mandated to negotiate with Israel. This is also recognized by the Hamas-led government that came to power after the 2006 PLC elections.”<sup>279</sup>

But even though the Oslo Accords are clear in this respect, there is nothing explicit in the text of Art 40 to indicate that the president acts in the capacity of PLO chairman. It was not in fact clear in which capacity Arafat exercised any of his authorities. Such an interpretation would also conflict with the principle of free and direct elections for president, as it would formally *require* the two posts to be inhabited by one and the same. In addition, Art 40 refers to “the National Authority’s delegates to foreign countries”, while the Interim Agreement states that the PA is not to establish any kind of missions and posts abroad. It would also be superfluous to address this issue in the Basic Law, that really only concerns the competencies of the PA. By default, the PLO operates beyond the reach of the Basic Law and its chairman would not need for the Basic Law to assign this authority.

Brown has furthermore pointed out that “PLC deputies were happiest when ignoring the Oslo Accords altogether”.<sup>280</sup> Independent member of the first PLC, Abdul Jawad Saleh, states that in drafting the Basic Law, the PLC “has not constrained itself by the Oslo Agreement”.<sup>281</sup> Paragraph 40 may in fact have echoed the first PLC’s vision of the new Palestinian political entity

---

<sup>279</sup> Butenschøn and Vollan, “Democracy in Conflict,” 26.

<sup>280</sup> Brown, *Palestinian Politics after the Oslo Accords*, 135.

<sup>281</sup> Saleh, interview, 2005.

as one “that differed little from existing democratic states”.<sup>282</sup> As President Arafat was in fact also PLO chairman, the distinction would at the time be seen as having no real practical effect. According to Barry Rubin, the real high command of the PA was a conjunction of the PLO Executive Committee, the Fatah Central Committee and the cabinet and executive branch personnel.<sup>283</sup> Power did shift from the PLO to the PA. In the words of Qaddura Fares, Fatah member of the first PLC: “The main institution should be the Executive Committee – not the government, not the PLC. But the reality was that we had the Authority, and the Authority had the power.”<sup>284</sup> However, the PLO kept its symbolic position of the higher reference and sole representative.

### ***Reform attempts***

The blurred lines between the PA and PLO would eventually manifest itself also in the confused organization of Palestinian representations. According to Abbas, an attempt to address this issue was made in 1996, when it was agreed the Palestinians were to be represented by two delegations. There would be a Palestinian delegation to be headed by Yasser Arafat. This delegation would among others include Farouq Qaddoumi (Fatah), head of PLOs political bureau in Tunis, and Palestinian negotiator and PLO Executive Committee member Yasser Abed Rabbo (Fida). In addition, there would be a delegation of foreign affairs to be headed by Shaath, who held the portfolio of Planning. The matter was never really settled, and this dualism caused confusion and frustration. In the words of Abbas: “People complained, saying that “we have two foreign ministers, two badges, two chairs, two cars, and two hotel suites. More seriously, we had two separate - and sometimes conflicting - political messages. Who represents the PLO? Who speaks for you? Who expresses your policies?”<sup>285</sup>

The issue of representation gained urgency after the second intifada, when Israeli and U.S. officials chose to abstain from direct dealings with the PLO chairman. Israeli Prime Minister Ariel Sharon made repeated threats to assassinate or expulse Arafat, who was now dismissed as an obstacle to peace. It was then decided that the president and the prime minister would sit on a PLO committee to agree on the red lines in negotiations that Arafat was now excluded from.<sup>286</sup> In 2002, Arafat convened the PLO Executive Committee in order to clarify matters. According to Abbas, it was then agreed that the jurisdictions would be shared between Minister of Planning,

---

<sup>282</sup> Brown, *Palestinian Politics after the Oslo Accords*, 135.

<sup>283</sup> Rubin, *The Transformation of Palestinian Politics: From Revolution to State-Building* (Cambridge: Harvard University Press, 1999), 16.

<sup>284</sup> Qaddura Fares, interview, Ramallah, 21 July 2005. See also Rubin, *The Transformation of Palestinian Politics*, 93-94.

<sup>285</sup> Abbas, “Resignation speech to the Palestinian Council,” 167.

<sup>286</sup> Parsons, *The Politics of the Palestinian Authority*, 291.

Shaath, and Qaddoumi, leader of the PLO political office.<sup>287</sup> Shaath was to represent the Palestinians in the Arab League and all matters dealing with Europe, while Qaddoumi would deal with Islamic Conference and the Non-Aligned Countries Conference and UN and African summit meetings. Abed Rabbo was to convey this message to Qaddoumi in Tunis, but Qaddoumi was not notified until Abbas appointed his cabinet in 2003. The portfolio of planning and international was retained with by Nabil Qassis (Independent) at the helm. In addition, Nabil Shaath was appointed minister of foreign affairs.<sup>288</sup> In order to separate between separate between negotiations and the PA, Saeb Erekat (Fatah) replaced Abbas as head of the PLO negotiation team and was awarded observer status in the cabinet.<sup>289</sup>

By attempting to transfer authority over the diplomatic services to the newly established Ministry of Foreign Affairs, the reforms indirectly framed the PLO, which was authorized to negotiate on behalf of the Palestinians. The PLO had gradually come to be considered by the international community as “something part of the militant history, part of the old discourse, part of the past”.<sup>290</sup> According to political scientist Bassem Ezbidid from Bir Zeit University, foreign governments, and particularly the Europeans, pressed towards reforming the Foreign Service: “The reform on that level was basically meant to end the linkage between the PLO as a revolutionary notion, end its domination and its monopoly over selecting and determining the Foreign Service members – which meant giving the initiative to the PA in order to determine this field of activities.”<sup>291</sup>

In his speech, Abbas describes how “all hell broke loose in Tunis” when news of the appointment of Shaath as foreign minister reached Qaddoumi.<sup>292</sup> The constitutional framework did not serve to clarify matters, and Arafat chose not to take a clear stand in the matter. Meanwhile, Shaath and Qaddoumi engaged in a struggle over the control of the diplomatic services. According to Abbas, the result was that no one ultimately knew who was responsible for the Ministry of Foreign Affairs: “The only victim of this fiasco is Palestinian diplomacy, and our envoys abroad. We can do nothing, while neither Qaddoumi nor Abu Ammar nor Shaath want to do anything. We have 89 [sic.] embassies in foreign countries, by the way, while Jordan for example has only 45.”

---

<sup>287</sup> Abbas, “Resignation speech to the Palestinian Council,” 167.

<sup>288</sup> See Parsons, *Politics in the Palestinian Authority*, Table 23 The Executive Authority, 29 April 2003, 334. The translations of the three portfolios vary in my sources, we see that there were three portfolios dealing with foreign affairs, planning and international cooperation and negotiations in Abbas’ cabinet.

<sup>289</sup> Abbas, “Resignation speech to the Palestinian Council,” 166.

<sup>290</sup> Bassem Ezbidid, interview, Ramallah, 13 July 2005.

<sup>291</sup> Ezbidid, interview, 2005.

<sup>292</sup> Abbas, “Resignation speech to the Palestinian Council,” 167.

Under the Oslo Accords, the PA was not supposed to have a foreign ministry. The PA established the Ministry of Planning and International Cooperation in order to handle international assistance to the PA. However, in 2003, the PA transformed this ministry into a Ministry of Foreign Affairs.<sup>293</sup> The ministry joined existing PLO structures to conduct diplomacy and foreign affairs. According to Parsons, the PLO maintained about 100<sup>294</sup> diplomatic missions abroad, as well as functioning permanent missions to the Arab League, the Organization of Islamic Conference and the UN.<sup>295</sup> The Ministry's own website stated that: "After the formation of the fifth Palestinian government, a new Ministry of Foreign Affairs was established. This Ministry undertakes all the duties associated with a typical foreign ministry in a sovereign country, in the course of managing Palestine's foreign relations that serves its national interests."

Finally, the text asserts that: "As in its capacity as Ministry of Foreign Affairs, the Ministry has a key role in all negotiations held on behalf of the Palestinian National Authority and the State of Palestine". In light of Abbas' statement that "the PA does not have the power to negotiate",<sup>296</sup> it seems reasonable to conclude that things were in fact not clarified. After Abbas' resignation as prime minister, his successor Ahmad Qureia kept Shaath, Qassis and Erekat in their respective positions, but the question of foreign affairs was never really solved. As long as Arafat was alive, the diplomatic corps mostly worked in close coordination with the PA, while Qaddoumi was able to play a role whenever Arafat found it expedient.<sup>297</sup>

When Abbas reappeared on the PA scene as president in February 2005, he kept Qureia on as prime minister. Palestine's ambassador to the UN, Nasser al-Qudwah, was appointed foreign minister in the first technocrat cabinet in PA history. As president, Abbas initially threw his weight behind al-Qudwah as PA foreign minister. In 2005, the PLC enacted the Diplomatic Corps Law, regulating Palestinian diplomatic activity, its powers and the administrative and financial aspects of its operation.<sup>298</sup> The Diplomatic Corps Law regulates the nomination, promotion and training of diplomats. The nomination is left to the president upon a

---

<sup>293</sup> Palestinian Ministry of Foreign Affairs, retrieved from the Internet Archive, 6 February, 2005. [http://web.archive.org/web/20050206011245/www.mofa.gov.ps/about\\_mofa/index.asp](http://web.archive.org/web/20050206011245/www.mofa.gov.ps/about_mofa/index.asp) (last accessed 18 November 2007).

<sup>294</sup> I cannot account for the discrepancy in the numbers provided by Abbas and Parsons respectively. The Ministry of Affairs as of 6 February 2005 website contained roughly 100 listings, Palestinian Ministry of Foreign Affairs, "Diplomatic Missions," retrieved from the Internet Archive, [http://web.archive.org/web/20050130044503/www.mofa.gov.ps/diplomatic\\_missions/index.asp](http://web.archive.org/web/20050130044503/www.mofa.gov.ps/diplomatic_missions/index.asp) (last accessed 16 February 2008). The listing is undated, but the URL indicates that it was posted in 2005.

<sup>295</sup> Parsons, *The Politics of the Palestinian Authority*, 291.

<sup>296</sup> Abbas, "Resignation speech to the Palestinian Council," 166.

<sup>297</sup> Parsons, *The Politics of the Palestinian Authority*, 291.

<sup>298</sup> PICCR, "The Status of Palestinian Citizens' Rights During 2005" 11'th Annual Report," Chapter 5: The Executive Authority (Ramallah: 2006), <http://www.piccr.org/dmdocuments/AnnualReports/2005/eng/part2chapter5.pdf> (last accessed 22 January 2008), 139.

recommendation from the minister of foreign affairs (Art 7).<sup>299</sup> Asem Khalil points out that there is no reference to the head of the PLO's Political Bureau in the nomination process. Art 3 states that the Ministry of Foreign Affairs is to represent Palestine in foreign countries and to consolidate the relationship with states and international organization. The ministry is also to oversee diplomatic missions politically, administratively and financially. Under the new law, al-Qudwah appointed a number of ambassadors to PA embassies in Arab and other foreign countries.<sup>300</sup> In a countermove, Qaddoumi renamed several ambassadors.<sup>301</sup> Abbas pressed ahead with the reforms, and in November 2005, 29 new ambassadors were sworn in by president Abbas.<sup>302</sup> Many of the ambassadors refused to leave their posts, and per January 2006, the situation was still unresolved.<sup>303</sup>

### ***Bypassing the cabinet***

In 2006, events took an unexpected turn with the electoral victory of Hamas in January and the appointment of Mahmoud al-Zahhar (Hamas) as foreign minister in the first Haniyeh Cabinet. This choice was particularly controversial as al-Zahhar was not a technocrat, but one of the co-founders of Hamas and part of the Hamas leadership in Gaza. Israel, the USA and the EU joined in a boycott of the new cabinet and stated that they would only negotiate with Abbas in the capacity of PLO chairman, as stipulated in the Oslo Accords. There would be no dialogue with the cabinet, in which all other factions refused to participate. Meanwhile, al-Zahhar made several unsuccessful attempts to lead diplomatic missions, but was "reminded that these contacts are part of the heritage of Oslo."<sup>304</sup> In May 2006 al-Zahhar was only a member of the Palestinian delegation to the conference of the Non-Aligned Movement in Malaysia. The delegation was led by Qaddoumi, who insulted al-Zahhar by stating that: "I would train you and then I will turn over

---

<sup>299</sup> As quoted in as quoted in Asem Khalil, "Legislating for Migration: The Anomalous case of the Palestinian Authority," Robert Schuman Center for Advanced Studies, European University Institute (San Domenico di Fiesole: 2006), [http://www.iue.it/RSCAS/e-texts/CARIM-AS06\\_11-Khalil.pdf](http://www.iue.it/RSCAS/e-texts/CARIM-AS06_11-Khalil.pdf) (last accessed 18 January 2008), 8-9. The Diplomatic Corps Law is available in Arabic on the website of the Palestinian Ministry of Foreign Affairs, [www.mofa.gov.ps/2Farabic%2Fsubject\\_details.php%3Fid%3D5205&langpair=ar%7Cen&hl=en&ie=UTF8](http://www.mofa.gov.ps/2Farabic%2Fsubject_details.php%3Fid%3D5205&langpair=ar%7Cen&hl=en&ie=UTF8) (last accessed 20 January 2008).

<sup>300</sup> Palestinian Information Center, "Qudwa to appoint new envoys to several Arab, foreign countries," 2 October 2005.

<sup>301</sup> Palestinian Information Center, "Qudwa appoints new PA envoys, Kaddoumi follows the suit," 3 Oct 2005.

<sup>302</sup> Palestinian Information Center, "29 new PA envoys sworn in before Abbas," 15 November 2005.

<sup>303</sup> *Maan*, "Chaos among Palestinian diplomats continues as many refuse to leave their positions," 12 January 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=6638> (last accessed 18 November 2007).

<sup>304</sup> *Maan*, "Qaddoumi to lead delegation to NAM," 27 May 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=11312> (last accessed 12 January 2007).

the whole process to you. And you be the minister of foreign affairs.”<sup>305</sup> Al-Zahhar left after only one day, having informed Reuters that he would “not stand side by side with a man that does not represent the Palestinian government”.<sup>306</sup> After this, al-Zahhar and Hamas reportedly retracted their decision to participate at a higher level. During the same month, it was reported that Abbas planned to meet with Qaddoumi in Tunisia “in an effort to end the divisions” between the PA and the PLO regarding the diplomatic missions. In June 2006, Abbas issued a presidential decree, appointing Qaddoumi as Palestinian foreign minister.<sup>307</sup> He also sent a letter to all diplomatic missions stating that Qaddoumi was “the sole” foreign minister representing Palestine.<sup>308</sup> Al-Zahhar, on the other hand, stated his refusal to recognize the PLO before it is reformed. He reportedly said to the United Arab Emirates newspaper *al-Bayan* that Palestinian representation would be via the Palestinian government, and not the PLO’s political department. Al-Zahhar went as far as saying that the government is the government of the Palestinians “all of them, everywhere, until the PLO’s role is activated and reformed”.<sup>309</sup> According to the Palestinian Independent Commission for Citizens’ Rights in their Annual Report for 2006, the government stated that “one of the most fundamental problems hampering its work on foreign affairs is the overlap of powers between the Presidency and the government”.<sup>310</sup> The PA president would frequently meet with foreign delegations without including the ministers in his own delegation – also in meetings with parties who did not boycott the Haniyeh Cabinet.

The first Haniyeh Cabinet lasted from March 2006 until March 2007, during which the EU, Israel and the USA maintained a total of boycott of the cabinet. In order to avoid a total economic collapse of the Palestinian economy, the EU and the World Bank established a Temporary International Mechanism (TIM) whereby funds were channeled directly to the presidency and personnel in key public sectors while bypassing the Hamas led cabinet. Meanwhile Fatah and Hamas negotiated to agree on the composition and platform for a national unity cabinet in the hope that the international society would accept a cabinet where also Fatah

<sup>305</sup> *BBC News Online* “Palestinian row overshadows talks,” 29 May 2006,

[http://news.bbc.co.uk/2/hi/middle\\_east/5026490.stm](http://news.bbc.co.uk/2/hi/middle_east/5026490.stm) (last accessed 18 November 2007).

<sup>306</sup> As quoted by *Maan*, “Zahhar refuses to take part in same international meeting as PLO’s Al-Qaddoumi,” 30 May 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=11430> (last accessed 12 January 2006).

<sup>307</sup> *Maan*, “Farouq Al Qaddoumi appointed Palestinian Foreign Minister,” 7 July 2006,

<http://www.maannews.net/en/index.php?opr=ShowDetails&ID=12995>, (last accessed 12 January 2007); and

“Abbas named PLO chief, Farouq Al-Qaddoumi, Minister of Foreign Affairs for Palestine,” 17 July 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=13757> (last accessed 16 May, 2007).

<sup>308</sup> Palestinian Information Center, “Abbas further complicates PA government’s mission, declares Qaddoumi sole Palestine FM,” 10 July 2006.

<sup>309</sup> As quoted by *Maan*, “Zahhar rejects referendum and says Palestinian representation overseas will now be governmental, not via PLO,” 6 June 2006,

<http://www.maannews.net/en/index.php?opr=ShowDetails&ID=11564> (last accessed 10 May 2007).

<sup>310</sup> PICCR, “The Status of Palestinian Citizens’ Rights During 2006,” 40.

was included. On 17 March 2007 the National Unity Cabinet was sworn under the premiership of Haniyeh. Al-Zahhar was replaced by Ziyad Abu Amr (Independent) as PA foreign minister. Even though the donor community still refused to deal with Hamas members, Abu Amr and Finance Minister Fayyad were able to meet with representatives of several Western countries personally and worked actively to persuade the donor community to lift the blockade against the PA. In this effort, he worked parallel with PLO chief negotiator, Erekat.

On 14 May 2007, the USA informed the EU that funds could now be channeled to the Palestinians through a PLO account managed by the finance minister. In their report on this news item, *Reuters* quoted a letter to the EU by U.S. Assistant Secretary of State for Near Eastern Affairs David Welch: “While our financial regulations with regard to transactions with the PA (Palestinian Authority) government remain in place, these restrictions do not apply to the PLO.”<sup>311</sup> Consequently, the cash flow was reversed from the PA and back to the PLO. TIM and the PLO account were used to channel funds directly to the president and the PLO respectively. PA employees would now get paid, but restrictions on the cabinet were to remain in place. The objective according to *Reuters* was to “ensure that banks felt comfortable transferring funds to the PLO and, in turn, to strengthen Palestinians like Fayyad and Abbas who favor a negotiated two-state solution to the conflict”.<sup>312</sup> On 14 June 2007 Hamas took military control of the Gaza Strip and Abbas dismissed the National Unity Cabinet. A new cabinet was established in Ramallah with Fayyad as prime minister. This set off a constitutional crisis that will be dealt with in a later chapter. However, the international community was quick to support Fayyad’s cabinet as the new face of the PA. Subsequent dealings with the Palestinians have taken place with the PA as the opposite party.

### ***Palestinian diplomacy in light of the 2002-2003 reforms***

The 2002-2003 reforms aimed at professionalizing not just the security apparatus, but also the diplomatic corps under the cabinet and the foreign minister. This part of the reforms deviated from the intention of the Oslo Accords and aimed at sidelining the PLO, which was associated with Arafat. The effort had been only partially completed when Hamas took power and was then immediately reversed. With the reversal of the 2002-2003 reforms in the field of negotiations the PA in some ways moved closer to its roots as a function of an agreement with the PLO and Israel. Simultaneously, the language of Oslo was revived in order to undercut Foreign Minister al-

---

<sup>311</sup> Adam Entous, “US OKs aid channel to Palestinian finance minister,” *Reuters AlertNet*, 17 May 2007, <http://www.alertnet.org/thenews/newsdesk/L15446167.htm> (last accessed 19 January 2008).

<sup>312</sup> Entous, “Aid flows into Palestinian account after U.S. shift,” *Reuters AlertNet*, 28 May 2007, <http://www.alertnet.org/thenews/newsdesk/L28330737.htm> (last accessed 19 January 2008).

Zahhar. In theory, this was not illegitimate, neither according to PLO statutes nor the Oslo Accords. However, neither did it amount to a clarification of the division of labor between the PA and the PLO.

As a liberation movement for the total body of Palestinians on both sides of the Green Line, it seems reasonable that the PLO is not subject to a Basic Law that governs the undefined territories of the PA. However, neither the Basic Law nor the PLC standing orders or any other PA legal framework provides for any formal mechanisms for separating the roles of the PA and the PLO, or for separating the roles of individuals who maintain positions in both entities. The uncertainty surrounding the establishment of PA allowed Arafat to activate PLO institutions selectively, and for specifically political purposes.<sup>313</sup> This has so far provided two sitting presidents with the possibility to lean on multiple sources of legitimacy in dealing with their cabinets and the PLC. The PLO can at any time be revived and be used as a tool to subvert the cabinet – and vice versa. After the 2006 PLC elections, editor Ali Alumina of the *Electronic Intifada* commented acidly on the renewed claims that it is the PLO, and not the PA, “that is the true representative of Palestinians”:

This could be convincing except for the fact that since signing the 1993 Oslo Accord, Fatah leaders have dismantled the PLO as a truly representative body and invested all their efforts into building up the PA as their powerbase. Once they lost their grip on the PA, they suddenly rediscovered the PLO.<sup>314</sup>

This follows the same pattern of personalized and deinstitutionalized politics that was conducted by Arafat and the old PLO elite.<sup>315</sup> Significant reforms would be reforms that countered this strategy and strengthened institutions on behalf of institutions. In vacillating between the PA and the PLO, the international community has in fact contributed to the deinstitutionalizing of Palestinian politics. This has allowed for an ad hoc and personalized approach to Palestinian institution building that downplays the importance of formal institutions, of which the Basic Law forms a vital part.

---

<sup>313</sup> Hilal and Khan, “State formation under the PNA,” 86.

<sup>314</sup> Ali Abunimah, “Dangreous dirty tricks in Palestine,” *The Electronic Intifada*, 6 June 2006. <http://electronicintifada.net/v2/article4765.shtml> (last accessed 4 December 2007).

<sup>315</sup> Robinson, *Building a Palestinian State*, 182.



## SUMMARY PART II

The 2003 amendment of the Basic Law aimed at strengthening the cabinet vis-à-vis the president and as far as possible resolve the issue of residual powers in favor of the cabinet. In a more subtle manner, the 2002-2003 reforms also targeted the PLO by creating an empowered cabinet that could emerge as an independent and distinct player in the Palestinian political system. The reforms were challenged almost immediately, initially by Arafat, later by PA internal power struggles, and finally by the international community. The 2002-2003 reforms were immediately eroded by President Arafat and his allies in the security forces who wanted to report directly to him. They were further eroded as the decision of Hamas to enter the political institutions first led Fatah members to prepare for electoral competition, and then to bolster their power within the post-election institutions. Strengthening Abbas was seen as one way of achieving those goals.

Arafat was criticized for consciously blurring the lines between the PA and the PLO in order to maximize his own room for maneuvering. Whenever feasible, he would evoke his prerogatives as PLO chairman. Even though Abbas was perceived as more orderly and reform minded than Arafat had been, he has eventually come to follow the same pattern. The international community has blurred the lines even further by not clarifying in what capacity they deal with Palestinian representatives and on what legislative basis. This hampers genuine reform efforts.

External pressure to follow up on the reforms subsided as the truce addressed the security concerns that had been a crucial motivation for the international community. The erosion of the 2003 amendment was therefore largely ignored. In addition, President Mahmoud Abbas was perceived as a moderate negotiating partner, and the international community did not press for measures that would constrict his powers. This indicates the personalized agenda that really underlay the reforms. The need to secure moderate allies among the Palestinians was given priority over Palestinian institutional development. The international boycott of the Hamas cabinet and the unity cabinet following the 2006 elections led to a further reversal of the 2003 amendment. Efforts by the president and the PLO to undercut it were welcomed by the international community. The cabinet was unable to exercise its powers as awarded in the 2003 amendment, and the constitutional reform cannot be seen as significant.

## PART III: REASSERTING THE PRESIDENCY

*The results of our elections have led to the creation of a new political reality, in which Hamas won the majority in the PLC. Therefore, it will be tasked with the formation of the new government.*

- President Mahmoud Abbas

### 7. 2006: Passing the High Constitutional Law

In January 2006, Hamas was brought to a resounding electoral victory, securing a comfortable majority in the PLC. For the first time, the PA's cabinet and prime minister would belong to a different party than the president. The very movement, which once represented the radical alternative to the entire political system as embodied in the PA institutions, would now govern through them. In the initial chapters of this thesis, I discussed how political actors sought to translate their aims into constitutional proposals and amendments. When the presidential party, Fatah, lost their majority in the PLC, this course of action would no longer be possible. Fatah started to prepare for their new role as an opposition party, and their focus shifted from influencing the actual constitutional framework to promoting a favorable interpretation of it.

On 13 February 2006, only days before the inauguration session of the second PLC, the outgoing PLC passed a new law for a Palestinian constitutional court. The law had been in the making for several years. Yet, the law was passed with last minute amendments that strengthened the presidential role in nominating high constitutional court judges. Moreover, the outgoing PLC made administrative decisions to establish new PLC posts, to which they appointed Fatah members. The tumultuous last session made world headlines as incoming PLC members vowed to overturn the decisions immediately. I will here present the decisions made by the outgoing PLC in their last session and discuss whether they were concurrent with the 2003 reforms.

#### ***Constitutional framework***

All Basic Law drafts have provided for a high constitutional court. The Amended Basic Law outlines the mandate of the High Constitutional Court in Art 103.1. Among others, the court is to consider the constitutionality of laws and regulations, and the interpretation of the Basic Law. According to plan, the High Constitutional Court was to be established by a separate piece of legislation, the High Constitutional Court Law (Art 103.2). The High Constitutional Court Law was to specify appointment procedures, the formation of the courts and the number of its members. Pending such legislation and the establishment of a constitutional court, the Palestinian High Court was to assume the duties of the High Constitutional Court (Art 104). Such a law had

been in the making, but had still not been completed when the 2006 elections took place. In their last session, five days before the scheduled constitutional oath taking of the new PLC, the outgoing PLC passed the High Constitutional Court Law with new amendments proposed by president Abbas.<sup>316</sup>

There might be slight variations in the competencies of constitutional courts, but they generally have the power to declare laws unconstitutional and void. Such courts can be seen as a “neutral arbiter” who can enforce the constitution “in a depoliticized manner”.<sup>317</sup> Constitutional courts can however, be a two-edged sword. Constitutional theorists continually grapple with the so-called “countermajoritarian dilemma” that emerges when courts by way of judicial review can strike down acts of a democratically elected legislature.<sup>318</sup> Brown has pointed out that the ability of regimes to pursue their own interpretations of constitutional texts, which are often vague, has allowed them to “rob constitutional provisions of any limiting power”.<sup>319</sup> Procedures for appointment of judges and bringing cases before the court as well as the constitutional text itself are of crucial importance in determining whether or not a constitutional court will be able to contribute in the consolidation of constitutionalism.

### ***Drafting the High Constitutional Court Law***

I have not been able to find a coherent account of how the drafting process of the High Constitutional Court Law proceeded, but a combination of media reports, human rights reports and personal correspondence with Brown seems to indicate that it went approximately like this: In December, the PLC legal committee had gathered to discuss changes in the first draft concerning the formation of the Court, the number of members and conditions for membership in order to prepare the draft for a second hearing in the PLC.<sup>320</sup> On 23 January 2005, president Abbas sent a letter to then PLC Speaker Rawhi Fattouh, indicating that he had approved a draft sent to the Presidential Office by the PLC Legal Committee. However, it turned out that this was not the same text that had been approved by the PLC. According to *Haaretz*, a second reading took place on 24 January 2006, the day before the elections.<sup>321</sup> The draft was subsequently referred to Abbas for his comments. According to Brown, Abbas returned the law and new amendments secretly to

---

<sup>316</sup> Arnon Regular, “PA parliament expands powers of Abbas in final session,” *Haaretz*, undated, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=682364&contrassID=2&subContrassID=15&sbSubContrassID=0&listSrc=Y> (last accessed 30 January 2007).

<sup>317</sup> Elster et.al., *Institutional Design in Post-communist Societies*, 102.

<sup>318</sup> Klug, *Constituting Democracy*, 18-19.

<sup>319</sup> Brown, *Constitutions in a Nonconstitutional World*, 106.

<sup>320</sup> *Maan*, “PLC Legal Committee discusses High Court Law,” 5 December 2005, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=5107> (last accessed 30 January 2007).

<sup>321</sup> Regular, “PA parliament expands powers of Abbas in final session”.

the PLC speaker after the 25 January elections. The final revisions transferred significant powers to the president by allowing Abbas to appoint judges to the High Constitutional Court without PLC approval. The president would merely be obliged to consult with the Supreme Judicial Council and the minister of justice.<sup>322</sup> The High Constitutional Court Law No. 3 of 2006 was passed by the PLC by 41-3 votes and one abstention.<sup>323</sup>

Incoming Hamas parliamentarians were observers to the session on 13 February, and vowed to overturn the legislation. In the first session after the inauguration session, 69 of 120 present MPs voted to revoke the laws, and Fatah members withdrew in protest. Erekat argued that the second parliament had no right to overturn the previous parliament's legislation. Azzam al-Ahmad, leader of Fatah's parliamentary faction accused Hamas of using their majority "to infringe the law on behalf of their interests".<sup>324</sup> The Hamas dominated second PLC, however, claimed that the first PLC's actions had been illegal. According to Brown, Hamas representatives argued that the session itself was not legal, as there was not a quorum. The minutes from the session reportedly stated that there was a quorum, but the new PLC claimed that a filmed version of the session shows that this was in fact not correct. On these grounds, the new PLC refused to approve the minutes of the outgoing PLC's last session. Fatah, on the other hand, asserted that the only the outgoing PLC could pass judgment on its own action. Secondly, they argued that even if the incoming PLC could change the minutes, it would have to be done at the session immediately following the last session of the outgoing PLC. According to Hamas, this did not happen because the first session was a ceremonial session where the new PLC was sworn in.<sup>325</sup>

Eventually, the second PLC passed a motion to refer the legislation to the High Court, acting as the Constitutional Court.<sup>326</sup> On 19 December 2006 the High Court acting as the Constitutional Court,<sup>327</sup> annulled Hamas' revocation.<sup>328</sup> The court reportedly ruled that the second

---

<sup>322</sup> PICCR, "The Status of Palestinian Citizens' Rights During 2006," 12th Annual Report, Chapter 3: The Judicial Authority, (Ramallah: 2007), footnote 106, 84.  
[http://www.piccr.org/dmdocuments/AnnualReports/2006/eng/chapter\\_3.pdf](http://www.piccr.org/dmdocuments/AnnualReports/2006/eng/chapter_3.pdf) (last accessed 27 November 2007).

<sup>323</sup> Brown, e-mail, 4 January 2007.

<sup>324</sup> *BBC News Online*, "Hamas-Fatah row goes before court," *Online*, 7 March 2006,  
[http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle\\_east/4781296.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4781296.stm) (last accessed 30 January 2007).

<sup>325</sup> Brown, e-mail, 2007.

<sup>326</sup> *BBC News Online*, "Hamas-Fatah row goes before court."

<sup>327</sup> In accordance with Art 104 of the Amended Basic Law, which states that "The High Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court, unless they fall within the jurisdiction of other judicial entities, in accordance with applicable laws."

<sup>328</sup> PICCR, "The Status of Palestinian Citizens' Rights During 2006," 18, 44. The decision is available in Arabic on the Bir Zeit Institute of Law: The Palestinian Legal and Judicial System "al-Muqtafi."  
<http://muqtafi.birzeit.edu/data/others/hicourt07.pdf> (last accessed 13 December 2007).

PLC had no authority to call off any resolutions of the previous parliament.<sup>329</sup> Hence, the High Constitutional Court Law is valid. The PLC speaker was reportedly rebuffed by the Chief Justice after having declared that the ruling was political.<sup>330</sup> As of 30 January 2007, Abbas was rumored to have begun such consultations to appointed judges for the new court.<sup>331</sup>

The last decisions made by the outgoing PLC were criticized on both procedural and constitutional grounds. I have not been able to obtain an English translation of the High Constitutional Court Law. The following is based on media reports and information from PCHR. In a press release dated 16 February 2006, the PCHR criticized Article 5 of the new law, concerning the initial forming of the court. The article states that the court's chief justice and judges are to be appointed by a presidential decree "in consultation" with the Higher Judicial Council and minister of justice.<sup>332</sup> The PHRC argued that the High Constitutional Court Law and the amendments made by the outgoing PLC were inconsistent with both the Amended Basic Law and the Judicial Authority Law. Art 99 of the Basic Law states that judges are to be appointed by the procedures defined in the Judicial Authority Law, which states that "filling judicial vacancies is done through a decision by the president of the PA based on nominations by the Higher Judicial Council" (Art 18<sup>333</sup>). The PCHR pointed out that there is "a clear difference between 'consultation' and 'nomination.'" The law was also amended by Abbas in the last minute, and these amendments weakened the court's mandate compared to earlier drafts. Previous drafts authorized the High Constitutional Court to monitor the constitutionality of "laws, decrees, presidential decisions, cabinet decisions, and regulations". In the amended version, the court's jurisdiction is limited to "monitoring the constitutionality of law and regulations". In other words, after the electoral loss of the president's party, presidential decrees and decisions were explicitly removed from the mandate of the Constitutional Court. Incoming PLC member Abdel Aziz Dwaik (incoming Speaker of the second PLC) described the move as a "bloodless coup".<sup>334</sup>

---

<sup>329</sup> *Xinhua*, "Palestinian court annuls Hamas-dominant parliament's decision to cancel previous legislation," 19 December 2006. *People's Daily Online*, [http://english.people.com.cn/200612/19/eng20061219\\_334075.html](http://english.people.com.cn/200612/19/eng20061219_334075.html) (last accessed 30 January 2007).

<sup>330</sup> Brown, e-mail, 2007.

<sup>331</sup> *Maan*, "Abbas 'still ready for dialogue', hints at a new 'temporary constitution,'" 22 December 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=18276> (last accessed 16 May 2007).

<sup>332</sup> Palestinian Center for Human Rights, "PCHR Expresses Reservations over the Final Session of the Outgoing Palestinian Legislative Council," Press Release, Ref: 20/2006, 16 February 2006, <http://www.pchrgaza.org/files/PressR/English/2006/25-2006.htm> (last accessed 18 January 2008).

<sup>333</sup> As quoted in PCHR, "PCHR Expresses Reservations over the Final Session of the Outgoing Palestinian Legislative Council."

<sup>334</sup> *The Jurist*, "Outgoing Palestinian assembly authorizes Abbas to appoint court overseeing Hamas," 13 February 2006. University of Pittsburgh School of Law, <http://jurist.law.pitt.edu/paperchase/2006/02/outgoing-palestinian-assembly.php> (last accessed 30 January 2007).

The PCHR also criticized the timing of the session and the nature of decisions made. In addition to passing a crucial piece of legislation, the first PLC added to the already pervasive duplication of structures by creating new administrative posts in the PLC. The new posts in question were those of Secretary General and Deputy Secretary General in the PLC. However, the Basic Law already provides for a presidency office in the PLC (Art 50). The presidency office is to be elected in the first session of the PLC, so the outgoing PLC did overstep its boundaries. The PCHR further pointed out that even though the Basic Law does not set a timeframe for the constitutional oath of a new PLC following legislative elections, the PLC Bylaws states that “the president of the PA shall invite the PLC to a session in the first regular term in the second week following the announcement of the official results of the elections” (Art 2.a). This was not done, and the outgoing PLC was allowed to “continue its work, and hold a final session that was not necessary”. While the PCHR recognized that the session was “held in accordance with Basic Law and its amendments”, they argued that it was “unacceptable” for the outgoing PLC to decide on issues such as staff recruitment more than two weeks following elections: “PCHR concludes that this must be seen as an attempt by an outgoing majority to pass laws and decisions before they themselves would become a minority in the PLC.”<sup>335</sup>

We have seen that the PLC in their outgoing session transferred powers to the presidency. Exempting presidential decisions from the scope of judicial review severely weakens the accountability of the executive as a whole, particularly in situations where the president’s party would simultaneously dominate the legislative and the executive. It is highly questionable whether the High Constitutional Court will be able to play a constructive role in ensuring the constitutionality of laws or in settling disputes between the various branches of government.

### ***The High Constitutional Court Law in light of the 2003 amendment***

The importance of the High Constitutional Court Law does not lie in the functioning of the actual court. In the conflicts that later arose between the president and the prime minister during 2006, so-called “expert committees” were established to discuss the constitutionality of decisions made by the president and the cabinet.<sup>336</sup> In their Annual Report for 2006, the PICCR states that the High Constitutional Court had not been activated,<sup>337</sup> although there were rumors that Abbas had consulted with potential judges after the ruling that the High Constitutional Court was not

---

<sup>335</sup> PCHR, “PCHR Expresses Reservations over the Final Session of the Outgoing Palestinian Legislative Council.”

<sup>336</sup> *Maan*, “Abbas forms committee to study the legal aspects of holding a referendum and another to write up referendum questions,” 6 June 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=11556> (last accessed 14 May 2007). I have not been able to establish whether these committees were able to reach any conclusions, but it seems clear that they were not able to resolve the conflict.

<sup>337</sup> PICCR, “The Status of Palestinian Citizens' Rights During 2006,” 81.

unconstitutional.<sup>338</sup> However, the amendments that were made fit into a general pattern whereby the president was strengthened. The High Constitutional Court Law must be seen in light of a series of decisions that aimed to strengthen the control of the presidency over various security and civil institutions, once the result of the elections was declared.<sup>339</sup>

In his initial months as president in 2005, Abbas moved to transfer a number of competencies from PLO institutions and the presidency to the PA cabinet level. This was in line with the 2003 amendment, which stipulated that the president was only to exercise his powers as specified within the Basic Law, whereas all other executive power fell to the cabinet. After the results of the elections made it clear that Hamas would take on cabinet power, these decisions were reversed. Previous chapters have shown how the presidency was reinforced in the areas of security and foreign affairs. These were not the only affected areas. The civil aviation and transport authority, which had been transferred to the presidency by Arafat, was transferred to the Ministry of Transport by President Abbas in 2005. After the elections, civil aviation was retransferred to the Presidential Office.<sup>340</sup> A decision to transfer the PLO's Palestinian News Agency (WAFA) to the Ministry of Information was reversed, and WAFA was brought back under the control of the PLO Executive Committee Chairman. The State Information Service had been transferred from the presidency to the Ministry of Information, was brought back to the presidency. In addition, the decision to move the Palestinian TV and Radio Station as well as the Palestinian Satellite Channel from the PLO Executive Committee and the PA Presidency into the portfolio of Ministry of Information was cancelled. Finally, the presidential decree transferring the Palestinian National Commission for Education, Culture & Science to the Council of Ministers was revoked, and the commission remains under the auspices of the PLO Education and Higher Education Department.<sup>341</sup> These decisions reduced the cabinet's responsibilities in direct contravention of the 2003 amendment.

The High Constitutional Court Law was the last example of an attempt by Fatah in their capacity of being the majority party to embed their interests in the constitutional framework. After the inauguration of the second PLC, the legislative process stagnated due to a combination of internal power struggles and the international boycott of the Hamas led institutions. Strategies shifted from influencing the constitutional texts into establishing one's own interpretation of it as authoritative. This is the topic of the next chapter.

---

<sup>338</sup> Brown, e-mail, 2007.

<sup>339</sup> PICCR, "The Status of Palestinian Citizens' Rights During 2006," 55.

<sup>340</sup> *Maan*, "The Palestinian civil aviation authority – under the control of the president or the minister of transportation?" 22 February 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=19904> (last accessed 27 November 2007).

<sup>341</sup> PICCR, "The Status of Palestinian Citizens' Rights During 2006," 41.

*... to stress that higher national interests call for respecting the “Basic Law” of the PNA ...*

- The Prisoner's Document

## **8. 2006-2007: Interpreting the Basic Law**

Following the parliamentary elections of January 2006, Abbas tasked Ismail Haniyeh of the winning Hamas party with the formation of a new Palestinian cabinet. After his appointment as prime minister, Haniyeh invited all the political factions represented in the PLC to join the cabinet, but they declined the invitation. Consequently, the Palestinian cabinet came to consist of a combination of Hamas members and technocrats close to Hamas. The US, the EU and Israel immediately demanded that the new cabinet would explicitly abstain from violence, recognize the existence of Israel, and respect previous accords with Israel. They also stated that they would not engage with the new cabinet, but only deal with President Abbas in his capacity as PLO chairman. As it became clear that their demands would not be met, the United States, the EU and Israel took the lead in imposing economic sanctions on the cabinet while supporting the presidency by depositing funding directly into the bank account of president Abbas and employees in key public sectors. The sanctions and Hamas' refusal to comply with international demands combined with a desire on behalf of strong elements within Fatah to regain their power led to a number of public confrontations.

Immediately after the elections, Abbas took a reconciliatory tone towards Hamas. While asking Hamas to change their attitude towards Israel, he indicated his wish to cooperate with the new PLC. In his inauguration speech to the second PLC, he stated: “You will find from my part all the cooperation and encouragement you need, because the national interest is our first and final goal, and is above any individual or faction”<sup>342</sup> However, he proceeded to challenge the government's authority in several ways that were significant to the Basic Law. The issues that were raised mainly pertained to the prerogatives of the president. From January 2006 until fall 2007, Abbas moved to call for a popular referendum, threatened to dismiss the PLC, issued a number of decrees while the PLC was still in session, declared a state of emergency and installed a caretaker cabinet without the confidence of the PLC.

The conflict between Fatah and Hamas after the elections grew increasingly violent, but it has also had a legal dimension. Parallel to fighting in the streets the parties also fought a PR war in the media. Central to this propaganda effort were arguments related to the Basic Law. From the very beginning, representatives of Hamas and Fatah respectively hurled accusations at each other,

---

<sup>342</sup> PNA President Abbas' speech in the opening session of the 2nd PLC, Ramallah, 18 February 2006, <http://www.jmcc.org/documents/abbasspeech2ndplc2.htm> (last accessed 19 January 2008).



both claiming that decisions made by the opposing party's actions were contrary to the Basic Law. Instead of simply ignoring the Basic Law, both parties tried to obtain acceptance for their interpretation of it, while discrediting the other as acting unconstitutionally.

Jon Elster has described a well-institutionalized order as one where the “rules according to which political and distributional conflicts are carried out are relatively immune from becoming themselves the object of such conflicts”.<sup>343</sup> After the assumption of power by Hamas, the rules of the political game in the PA became contested. By introducing a divided majority with a Hamas majority in parliament and a Fatah president, the 2006 elections marked a turning point in Palestinian political history. This exacerbated already existing conflicts within the executive and put the Basic Law to a test in significant areas and provided the first opportunity to observe the constitutional mechanisms at play under circumstances that had not been predicted by the drafters.

On 14 June 2007 events culminated as Abbas dismissed the National Unity Cabinet, declared a state of emergency and installed an emergency cabinet with Fayyad as prime minister in the West Bank. The remnants of the National Unity Cabinet in Gaza refused to recognize the new cabinet and maintained their rule over Gaza under the deposed Prime Minister Haniyeh. In the following days, declarations of recognition and support for the Fayyad Cabinet came from the EU, the USA and the Quartet, while the deposed Haniyeh Cabinet remained isolated in Gaza.

Brown has pointed out that: “The question [...] is not whether the constitution will be enforced but whose interpretation of it will be authoritative”.<sup>344</sup> This chapter returns to the first main question of how various political interests influenced Palestinian constitutional development. Whereas the first part dealt with the effect of the various interests on the Basic Law in its quality as a legal text, this chapter discusses how political actors influence constitutional development by trying to establish their own interpretation of the Basic Law as authoritative. What were the main constitutional debates, and how did they relate to the 2003 amendment of the Basic Law? How did the conflict affect the ability of the Basic Law to impact on politics?

## ***Constitutional issues***

### **Calling for referendums**

The first Haniyeh government (March 2006-March 2007) was faced with overwhelming challenges. These included the imposition of international sanctions, massive strikes that were motivated by political considerations, lacking payment of salaries, and an increasing level of violence. Despite this, the government refused to back down. On the ground, violence escalated

---

<sup>343</sup> Elster et.al., *Institutional Design in Post-communist Societies*, 28.

<sup>344</sup> Brown, *Constitutions in a Nonconstitutional World*, 106.

among the various factions. In response to the precarious situation, Palestinian faction leaders in Israeli jails joined in writing the first version of the Prisoners' Document.<sup>345</sup> The document contained a number of political declarations that were meant to serve as basis of consensus among the factions, and to provide a starting point for negotiations to form a national unity cabinet with ministers drawn from all the political factions represented in the PLC. Even though the document was signed by all faction leaders in jail, the document was not accepted by the Hamas cabinet. The disagreement over the Prisoner's Document was related to recognition of Israel and former agreements made with Israel, and the right to armed resistance.

On 6 June 2006, Abbas gave Hamas an ultimatum, stating that he would call a referendum on the document if Hamas would not endorse it.<sup>346</sup> Haniyeh responded by sending a letter to Abbas stating that the planned referendum lacked a constitutional basis.<sup>347</sup> He continued to write that it would have been better to conduct a referendum on the Oslo Accords. The day after, on 10 June, Abbas issued a presidential decree setting 26 July as the date for the referendum on the Prisoner's document. The referendum was to answer "either Yes or No" to the following question: "Do you agree to the national conciliation document "Prisoners Document?" The decree was issued on a decision by the PLO Executive Committee a few days earlier. Even though the Law of Elections did not open for referendums, Abbas referred to the Law of Elections for the procedural side of the matter: The referendum was to be held according to "the provisions of Elections Law no. 9 for 2005 and the relevant regulations shall be applied on any issue not mentioned in the text of this decree and to the extent required by the referendum process". Any matter absent in the text was to be decided on by the Central Elections Commission.<sup>348</sup>

The Law of Elections regulates the elections for president and the PLC, but similar to the Basic Law, it contains no reference to referendums. Hamas consistently rejected the referendum and repeated that it lacked a constitutional base. In spite of this controversy, the parties decided to continue the national dialogue. On 28 June the parties agreed to a new version of the Prisoners' Document, and the referendum debate was shelved. Three questions had been at stake: Would such a referendum at all be legal? Supposing it were, should the result be binding or not, and would the right of initiative lie with the president or the prime minister?

---

<sup>345</sup> *National Conciliation Document of the Prisoners*, first version, 11 May 2006. JMCC, <http://www.jmcc.org/documents/prisoners.htm> (last accessed 19 January 2007).

<sup>346</sup> *BBC News Online*, "Abbas risks all with vote strategy," 6 June 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/5052288.stm](http://news.bbc.co.uk/2/hi/middle_east/5052288.stm) (last accessed 4 January 2007).

<sup>347</sup> *Maan*, "PM Haniyeh's letter to Abbas: a referendum is illegal and will just further divide the Palestinians," 9 June 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=11692> (last accessed 4 January 2007).

<sup>348</sup> The Chairman of the PLO and the PA President, *Presidential decree no. () for 2006*, Ramallah, 10 July 2006. JMCC, <http://www.jmcc.org/documents/referendum.htm> (last accessed 4 January 2007).

The absence of referendums in the Basic Law led Hamas to the conclusion that the presidential decree was illegal. Fatah reached the opposite conclusion and argued that the president had the authority to call for a referendum as the Basic Law did not specifically forbid it. Fatah also argued that in any case the referendum would be considered advisory as opposed to binding. Hamas argued that a referendum would have to be rooted in constitutional provisions, and that the proposed referendum was an attempt at undemocratic blackmail of the people. Fatah legitimized their point of view by the absence of an explicit prohibition in the Basic Law. Axiomatic to their argument was that the right of initiation would lie with the president or the PLO Executive Committee. Hamas argued that the absence of referendums in the Basic Law amounted to making the referendum call illegal. Consequently, they did not proceed to debate the issue of initiation rights.

Brown argues that: “This remarkably expansive view of presidential authority – that the president may do anything not explicitly prohibited – seems unsupported by the Basic Law.” He refers to Art 38 of the Amended Basic Law, which specifically limits the president to exercise his powers as defined by the Basic Law. The amendment furthermore transfers powers from the president to the cabinet and defines the cabinet as the “highest executive tool” (Art 63).

Butenschøn and Vollan argue that it “seems reasonable to assume that the President may ask the people for advice,” they also point out that in the cases of ad hoc referendums, it is usually the parliament who asks for advice.<sup>349</sup> In this case, the majority of the PLC was opposed to the referendum. Further complicating the issue of referendums is that the carrying out of a referendum would depend on the cooperation of bodies that do not answer to the president, but to the cabinet, such as the Ministry of Interior and Ministry of Education.<sup>350</sup> Even if the president were to hold such a prerogative, the question remains whether or not the presidential decree would be a formality. Would the power of initiative lie with the prime minister, or would it be for the president to decide when and if a referendum would be politically expedient. It would also have to be established what role the PLC should play in ratifying the call for referendums and the eventual result. During the summer of 2006, the parties managed to reach an agreement on the Prisoners’ Document, and Abbas did not go through with the referendum call.

---

<sup>349</sup> Butenschøn and Vollan, “Democracy in Conflict,” 146.

<sup>350</sup> For a further discussion on the issue of referendums and the Basic Law, see Brown, “What can Abu Mazin do?” web commentary (Washington; Carnegie Endowment for International Peace, 15 June 2007), <http://www.carnegieendowment.org/files/AbuMazinUpdateJune1507.pdf> (last accessed 18 January 2008), 3-4; and Butenschøn and Vollan, “Democracy in Conflict,” 146.

## Dismissing the parliament and holding early elections

Once the parties had been able to conclude on a political platform based on the Prisoners' Document in the fall of 2006, new problems arose as Fatah and Hamas started negotiating on the composition of the unity cabinet. Hamas argued that Hamas as the biggest block should also hold the prime minister while Fatah argued that a Fatah prime minister was required in order to present a moderate face to the world. A cycle of negotiations and stalemate continued. The disagreement was related to the question of recognizing Israel and the distribution of ministerial posts. The conflict culminated on 16 December 2006, when Abbas called for new parliamentary and presidential elections upon a recommendation from the PLO Executive Committee.<sup>351</sup>

Chief of the Legal Committee of the Palestinian Legislative Council (PLC) and Hamas bloc leader, Farad al-Ghool, argued that the president could dismiss the cabinet or resign himself, but that it would be illegal to dismiss the PLC.<sup>352</sup> Al-Ghool contended that the PLO Executive Committee was trying to trick Arafat into violating the constitution, while stressing the need to adhere to the Basic Law and continue the national dialogue. Hamas leader Khalil al-Haiyeh considered it "unacceptable that whenever the president is at odds with his government, he calls new elections every six months, thereby expending lots of money and effort."<sup>353</sup> He further pointed out that early elections could only be a solution if Fatah was absolutely confident of winning.<sup>354</sup> "What will happen if Hamas wins the new presidential and legislative elections? Will that end the national project or do we enter a new show?" he asked rhetorically. Hamas also resented the PLO Executive Committee's role in the matter. Deputy speaker of the Hamas block in the PLC, al-Yahiya Moussa, blasted the PLO Executive Committee, stating that: "There is nothing in the Basic Law which allows the executive committee to interfere in the Palestinian Authority's affairs. The issue of elections is specified clearly in the law."<sup>355</sup>

However, Abbas stopped short of announcing decree specifying a date for the elections, and Haniyeh got yet another three months to form a unity cabinet. Clashes and various initiatives to move the dialogue continued until February, when Saudi Arabia invited Abbas and Haniyeh to Mecca for a final round of negotiations. The parties finally managed to agree on the formation of a unity cabinet which was sworn in on March 2007. However, conflicts over the security forces

---

<sup>351</sup> *Maan*, "Abbas expected to announce his acceptance of PLO recommendations to hold early elections," 12 December 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=18032> (last accessed 18 May 2007).

<sup>352</sup> *Maan*, "The Hamas Block in the PLC slams the PLO Executive Committee," 10 December 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=17977> (last accessed 18 January 2008).

<sup>353</sup> *Maan*, "Hamas official calls for Abbas' resignation; presidential aides call for early elections - Hamas rejects suggestion," 11 December 2006, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=17987> (last accessed 18 January 2008).

<sup>354</sup> *Maan*, "Hamas official calls for Abbas' resignation."

<sup>355</sup> *Maan*, "Hamas officials calls for Abbas' resignation."

ripped at the cabinet and armed clashes between Fatah and Hamas related forces continued on the ground. On 13 June, Fatah withdrew its ministers from the National Unity Cabinet. The day after Hamas' military forces, the Executive Force and al-Qassam, brigades took military control of Gaza. Upon a recommendation by the PLO Executive Committee, President Abbas dismissed Prime Minister Haniyeh and his cabinet and declared a state of emergency on 14 June 2007. The following day, he appointed Fayyad as prime minister.

The dismissal of the National Unity Cabinet rekindled the debate on whether the president was allowed to call for early parliamentary elections. Hamas rejected claims that this was within the president's prerogatives and raged at an alleged suggestion from PNC speaker Salim Zanoun to replace the PLC with the PLO Central Council and the Palestinian National Council.<sup>356</sup> Bahar argued that Zanoun's statements were "extreme violations of Palestinian democracy and the Palestinian Law". In referring to Art 113 of the Basic Law, he asserted that it is forbidden to harm the PLC in any ordinary or emergency circumstances. Fatah's parliamentary leader, Azzam al-Ahmad, counterclaimed that under Art 43 the president under pressing circumstances, and while the PLC is not in session, can issue declarations and decrees that have the power of law. According to al-Ahmad, Abbas could make use of this article to call for early elections.<sup>357</sup>

The second PLC was for weeks and months at a time unable to convene with the required quorum of 67 parliamentarians. Fatah knew that if the PLC was not able to function, this would enable the president to claim that new PLC elections were not only legitimate, but also necessary. This line of thinking is evident in al-Ahmad's statement that: "If the PLC remains inactive, and the Palestinian forces [Hamas and Fatah] do not come to an understanding, it is very reasonable to call for early elections, and there is nothing in the Basic Law that prevents the idea."

It was in the interest of Hamas to root their argument firmly in the constitutional provisions. Art 113 of the Basic Law states that: "The Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended. Furthermore, Art 47.3 of the Basic Law according to the 2005 amendment points out that: "The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once each four years in a regular manner." The 2005 Law of Elections states that the president shall "within at least three months prior to the expiry of the council's term in office, issue a decree calling for presidential and legislative elections throughout

---

<sup>356</sup> *Maan*, "Acting PLC speaker outlines his constitutional concerns following Abbas' address Wednesday," 21 June 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23184> (last accessed 18 January 2008).

<sup>357</sup> *Maan*, "PLC session hangs in the balance: Fatah declares session 'illegal'; Hamas urges Fatah to end 'boycott'," 5 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23660> (last accessed 18 January 2008).

the Palestinian territories indicating the date thereof” (Art 7). Moreover, Art 2.2 of the Law of Elections sets the council’s term to four years commencing from the election date, and stipulates that “Elections shall be held periodically every four years” (Art 2.4). In spite of claims that the Basic Law is not clear in this issue, Brown states that the Basic Law is in fact both clear and definitive:

There is no loophole—under existing constitutional provisions, Abu Mazin has no more basis for early parliamentary elections than President George W. Bush has for ordering new Congressional elections if he does not like the result. Parliamentary elections before 2010 would require that the constitution be amended - which only the Hamas dominated Legislative Council could do.<sup>358</sup>

If early elections were an option, it would as the issue or referendums raise certain questions: To what extent should the prime minister be involved, and should the president be able to initiate new elections against the will of a cabinet that enjoys parliamentary confidence? In binding the president to exercise his duties “as specified in this law” (Art 38), the Amended Basic Law assigns all power that is not specifically defined in the Basic Law to the cabinet. Even though the Law of Elections states that the call for elections is to come from the president (Art 7), the logic of the 2003 amendment would indicate the cabinet and or the PLC should play role in making such a decision.

### **Dismissing the cabinet**

Two days after Abbas declared a state of emergency on 14 June 2007, Fayyad and his so-called emergency cabinet took oath in Ramallah. The decisions were immediately endorsed by the Quartet.<sup>359</sup> The EU presidency explicitly supported “President Abbas’ decision, in keeping with the Palestinian Basic Law, to dismiss the government and to appoint a caretaker government for the Palestinian territories”. The internationally backed Fayyad Cabinet started exercising power in the West Bank, while the remnants of the National Unity Cabinet in Gaza refused to step down. The reason why Hamas refused to relinquish power to the new cabinet was not that they disputed the right of the president to dismiss the cabinet. The disagreement was related to the correct procedure for the formation of a new cabinet. Acting PLC Speaker<sup>360</sup> Ahmad Bahar (Hamas) explicitly conceded that “Haniyeh’s government is considered resigned”, but also stated that “it must continue its duties as a transitional government, until a new government is formed with the approval of the PLC.”<sup>361</sup> Abbas claimed that under the Basic Law, the president could appoint an

---

<sup>358</sup> Nathan J. Brown, “What can Abu Mazin do?” 3.

<sup>359</sup> *Maan*, “Quartet and others express support for President Abbas and his emergency government,” 19 June 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23115> (last accessed 18 January 2008).

<sup>360</sup> PLC Speaker Aziz Dwaik was arrested by the Israeli army on 6 August 2006.

<sup>361</sup> *Maan*, “Acting PLC speaker deems Abbas' new government a ‘coup’,” 27 June 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23376> (last accessed 21 January 2008).

“emergency cabinet” which would be legitimate for 30 days before being presented to the PLC. This perception was supported by the Quartet. However, the Basic Law does not include specific provisions for emergency cabinets. The source of the reference to the “30 days” is most likely Art 110 which states the procedure for declaring a state of emergency: “The President of the National Authority may declare a state of emergency by decree when there is a threat to national security caused by war, invasion, armed insurrection or in times of natural disaster, for a period not to exceed thirty (30) days.”

As 13 July and the end of the 30 days was approaching, Abbas asked the PLC to convene a special session to grant confidence to the new cabinet.<sup>362</sup> However, the PLC was not able to obtain the required quorum as the entire Fatah block was absent.<sup>363</sup> Instead, Fayyad stepped down and was immediately reappointed as prime minister in a caretaker capacity. After the failed PLC session, Bahar wrote a letter to the president, requesting him to replace Fayyad with another figure.<sup>364</sup> He argued that the caretaker government had not won the confidence of the PLC. This is required according to Article 66, which states that:

Once the Prime Minister selects the members of the government, the Prime Minister shall submit a request to the Legislative Council to hold a special session for a vote of confidence. [...] The session shall be held no later than one week from the date of submission of the request.

Bahar had previously argued that a government requires PLC confidence in order to be legal, and that the unity cabinet “remains legal as a transitional government, until a new government gains the PLC’s confidence”.<sup>365</sup> He reiterated that according to Art 79.4 the prime minister, or any other minister, may not start their duties before gaining the approval of the PLC.

The Legislation Office of the Cabinet in Ramallah offered a different perspective. Former Minister of Justice, Abdul Karim Abu Salah, head of the Legislation Office, issued a statement where he referred to Art 6 of the Basic Law, which states that: “The principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.” Under paragraph six, the Hamas takeover of Gaza was illegal, and the results of it are null and void, Abu Salah stated. He further more argued that Art 113 of the Basic Law gives the president “the right to suspend the Basic Law completely,

---

<sup>362</sup> *Maan*, “Fayyad appeals to Bahar to hold PLC vote of confidence for new ‘caretaker’ government,” 16 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23985> (last accessed 18 January 2008).

<sup>363</sup> *Maan*, “PLC vote-of-confidence session fails,” 22 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=24181> (last accessed 18 January 2008).

<sup>364</sup> *Maan*, “Acting PLC speaker appeals to Abbas following the failure of vote-of-confidence session,” 24 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=24226> (last accessed 18 January 2008).

<sup>365</sup> *Maan*, “Abbas bends Palestinian law in order to legitimise his emergency government,” 17 June 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23045> (last accessed 18 January 2008).

including chapter 5, which is related to the executive authority”.<sup>366</sup> Article 113, however, reads like this: “The Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended.” It is hard to see how Abu Salah could reach the conclusion that this article authorizes the president to suspend the Basic Law. The logic seems to be that the Hamas takeover in Gaza hinders the PLC in doing its work, and therefore the president is entitled to ignore chapter five, which also deals with cabinet formation and the requirement of PLC approval. The Basic Law does not specify procedures for what should happen in the event of a cabinet dissolution by the president. However, in the event of a declaration of no confidence by the PLC, Art 78.3 of the Amended Basic Law states that:

Upon the completion of the term of the Prime Minister and the government, they will temporarily exercise their powers in the capacity of a caretaker government, during which they may make decisions only insofar as they are necessary for the conduct of executive affairs until a new government is formed.

Brown points out that the exact meaning of “term” in Arabic refers to the government’s *wilaya* – i.e. its authority to govern – having ended.<sup>367</sup> This would also apply to dismissal by the president and that a state of emergency would not warrant an exception. Art 79.4 explicitly states that a no minister may assume power without an affirmative vote of confidence by the PLC. This was also the argument posed by Hamas as Haniyeh insisted to continue in a caretaker capacity until the new cabinet had obtained confidence in the PLC.<sup>368</sup> While Fatah argued that the president under the state of emergency would be allowed to suspend the parts of the Basic Law, in this particular instance the articles concerning the executive, Hamas demanded that Articles 66 and 79 regarding parliamentary confidence be kept.

Attorneys Anis al-Qassem and Yugin Qatran, who participated in the early drafting of the Basic Law, supported Hamas’ position that Abbas could not appoint a new government with parliamentary approval. A third drafter, Ahmed el-Khalidi, warned that Palestinian democracy was “in retreat”.<sup>369</sup> In an e-mail to Reuters, al-Qassem stated that: “As to the powers of the president in a state of emergency, the only power specifically given to him is to declare the state

<sup>366</sup> *Maan*, “Hamas’ takeover was illegal, President Abbas’ decrees are legal, the PA legislation office says,” 17 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=24047> (last accessed 18 January 2008).

<sup>367</sup> Brown, “What can Abu Mazin do?” 7.

<sup>368</sup> *Maan*, “Acting PLC speaker deems Abbas’ new government a ‘coup’,” 27 June 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23376> (last accessed 21 January 2008).

<sup>369</sup> The comments by the three attorneys were picked up by a number of news organizations. Quotations here are from Khaled Amayreh, “Fayyad’s precarious government,” *Al Ahram Weekly Online*, 12 - 18 July 2007 Issue No. 853, <http://weekly.ahram.org.eg/2007/853/re61.htm> (last accessed 19 February 2008); and Khaled Abu Toameh, “‘Abbas creating military dictatorship’,” *Jerusalem Post Online Edition*, 11 July 2007, <http://www.jpost.com/servlet/Satellite?cid=1184063445218&pagename=JPost%2FJPArticle%2FShowFull> (last accessed 19 February 2008). Briefly after making these statements, al-Khalidi was briefly abducted by gunmen sympathetic to Fatah. Both Amayreh and Toameh claim that the abduction was intended to send a warning to legal scholars who have been criticizing Abbas’s violations of the Basic Law.



of emergency in the manner provided in Article 110. He cannot issue decrees suspending any provisions of the Basic Law.”<sup>370</sup> The 2003 amendment did not directly address the role of the PLC. However, when Abbas dismissed the cabinet and installed a cabinet which derives its legitimacy directly from a presidential endorsement, this undermines not only the PLC, but also the position on Prime Minister Fayyad and his cabinet, who now depend solely on the good will of the president. This is a serious backlash to a reform which aimed to turn the cabinet into the highest executive tool. By early 2008, Fayyad’s cabinet had still not been able to obtain confidence in the PLC.

**Table 3. Failed PLC sessions in July 2007**<sup>371</sup>

<b>Date</b>	<b>Convened by</b>	<b>Boycotted by</b>
Thursday 5 July 2007	Acting PLC Speaker Ahmad Bahar called for an opening session in an exceptional round.	Fatah
Wednesday 11 July 2007	Abbas called for the opening session in the second round of the new term to elect a new Speaker.	Hamas
Sunday 22 July 2007	Bahar called for a session to request confidence for the emergency cabinet.	Fatah

### **Declaring a state of emergency and ruling by decree**

In addition to dismissing the cabinet on 14 June 2007, Abbas declared a state of emergency in the PA. In the Arab world, emergency provisions in the constitution are generally supplied by an emergency law that fills in the details left vague in the constitution.<sup>372</sup> In the Palestinian case, there is no relevant legislation except from Articles 110-114 in the Basic Law. The president may declare a state of emergency by a decree when there is a threat to national security caused by war, invasion, armed insurrection, or a time of natural disaster for a period not to exceed thirty (30) days (Art 110.1). The president needs an approval of two thirds of the PLC in order to extend the state of emergency (Art 110.2). The decree must state the purpose of the state of emergency and define what territories it applies to (Art 110.3). The PLC is authorized to review all or some of the procedures implemented during the state of emergency (Art 110.4). Art 113 states that the PLC

<sup>370</sup> Anis al-Qassem, “TEXT-Opinion of lawyer who drafted Palestinian law,” e-mail to *Reuters*, 8 July 2007.

*Reuters AlertNet*, <http://www.alertnet.org/thenews/newsdesk/L0880166.htm> (last accessed 21 February 2008).

<sup>371</sup> PCHR, “Political Dialogue is the Only Solution to the PLC Crisis,” press release, Ref: 158/2007, 11 November 2007, Gaza, <http://www.pchrgaza.org/files/PressR/English/2007/158-2007.html> (last accessed 19 January 2008).

<sup>372</sup> Brown, “What can Abu Mazin do?” 6.

cannot be dissolved or suspended during states of emergency, and this provision may not be suspended.

The declaration of Abbas to declare a state of emergency was not contested by Hamas, but there were disagreements as to the president's prerogatives once the state of emergency had been declared. During the summer of 2007, Abbas issued a string of decrees, such as disbanding armed militias, revoking the NGO law, and dissolving the NSC.<sup>373</sup> The decrees were controversial, and one of the consequences was the disbanding of more than 100 Hamas affiliated charities.<sup>374</sup> The president's right to issue decrees with the power of law only applies when the PLC is not in session. The president's legislative powers are defined in Art 43 of the Amended Basic Law, which states that:

The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.

The prerogatives of the president to issue decrees when the PLC is not in session unleashed a dispute as to the legality of a number of PLC sessions. During the spring of 2007 there had been increasing concern on behalf of individual PLC members that the PLC was unable to obtain a quorum. On 21 April, PLC member Jamil Majdalawi (PFLP) argued that the PLC should resign if they would continue to fail at holding regular sessions.<sup>375</sup> The failure of the PLC to obtain quorum was partly due to the difficult security situation, but according to Khreisha, it was also a conscious tactic on behalf of Fatah and Hamas respectively to prevent legislation that would be contrary to their interests.<sup>376</sup> During the summer of 2007 the contending parties played a technical game involving the nitty-gritty of the Standing Orders for the PLC, which regulate the internal workings of the PLC. The dispute concerned the call of President Abbas to start a second period of the PLC. According to Art 16 of the Standing Orders, the PLC sessions are organized in two periods lasting for four months, the first starting in the week of May, and the second in the first week of September. According to Art 52 of the Amended Basic Law, the president is to open the first ordinary session of the PLC and deliver an opening speech. Art 16 of the Standing Orders

---

<sup>373</sup> The JMCC features an overview of important presidential decrees issued in June and July. See <http://www.jmcc.org/goodgovern/07/eng/presidentdecrees07.htm> (last accessed 1 February 2008).

<sup>374</sup> PCHR, "PCHR Seriously Concerned by the Closure of 103 NGO's," press release, Ref: 110/2007, 29 August 2007, <http://www.pchrgaza.org/files/PressR/English/2007/110-2007.html> (last accessed 19 January 2008).

<sup>375</sup> *Maan*, "PLC member Majdalawi condemns lack of PLC achievement," 21 April 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=21376> (last accessed 24 February 2008).

<sup>376</sup> Statement to *Reuters* as quoted in Tonje M. Viken, "Skyggeparlamentet," *Palestinabladet*, Vol 12, No 2, 2007. Palestina.no, <http://www.palestina.no/filerep/Pages%208-9%20from%200207-2.pdf> (last accessed 24 February 2008), 8.

stipulate that the “President of the PNA will call the Council to convene its ordinary annual session.” Opening the second period would require a new leadership for the PLC to be elected, and Fatah was keen to replace the Hamas-elected leadership with its own people. Fatah parliamentarian Azzam al-Ahmad argued that the PLC’s first session, which had started on 3 March 2007 and lasted for four months, ended on Wednesday 5 July. Consequently, any PLC session planned after 4 July would be illegal. From Al-Ahmads perspective, Fatah was not boycotting the PLC, but refused to attend an unlawfully convened assembly.”<sup>377</sup> Several attempts to convene the PLC during July 2007 failed. Ibrahim Khreisha, Secretary-General of the PLC,<sup>378</sup> argued that since Hamas rejected the presidential appeal to start a second period, it was impossible to hold PLC sessions. Fatah further argued that the inactivity of the PLC authorized the president to issue decrees which are binding by law. Khreisha warned that the inactivity of the PLC would authorize the president to take on “some of the authorities which are not found in the Basic Law”.<sup>379</sup>

Abbas exercised one such authority on 3 September 2007, when he issued a decree to replace the 2005 Law of Elections with a new elections law.<sup>380</sup> The decree stipulated the annulment of Elections Law No. 9 of 2005 and adopts a complete proportional system with all the occupied territories as one electoral unit, as requested by the PLO. The decision also requires all presidential and party candidates to commit to the PLO as the sole legitimate representative of the Palestinian people, to the Declaration of Independence, and to the Basic Law (Art 36). Hasan Khreisha (Independent), second-deputy speaker of the PLC criticized the move and argued that “nobody can force decisions on the PLC, as ratifying decisions is the PLC’s prerogative, and that “Neither the president, nor anyone else, has the right to impose laws on the PLC”. Khreisha said that the PLO’s Central Council asked the PLC to adopt a system of proportional representation in elections, and that the PLC has the right to accept or reject the suggestion.<sup>381</sup> He furthermore

---

<sup>377</sup> *Maan*, “PLC session hangs in the balance: Fatah declares session ‘illegal’; Hamas urges Fatah to end ‘boycott’,” 5 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23660> (last accessed 18 January 2008).

<sup>378</sup> Ibrahim Khreisha was appointed Secretary-General by the first PLC in their last session. He is not to be confused with Independent PLC member Hasan Khreisha who is second-deputy speaker of the PLC.

<sup>379</sup> *Maan*, “PLC suspends session due to lack of quorum,” 11 July 2007 <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=23833> (last accessed 18 January 2008).

<sup>380</sup> The Chairman of the PLO and the PA President, *A decree issued by a law number ( ) of 2007, pertaining the general elections*. Translation by IFES (formerly International Foundation for Election Systems). Palestinian Central Elections Commission, [http://www.elections.ps/pdf/Election\\_Law\\_\(2007-Sept\\_02\)-EN.pdf](http://www.elections.ps/pdf/Election_Law_(2007-Sept_02)-EN.pdf) (last accessed 19 January 2008).

<sup>381</sup> *Maan*, “Second-deputy of the PLC condemns Abbas' attempts to impose laws on the decision-making body,” 15 August 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=24735> (last accessed 18 January 2008).

stated that “Abu Mazin's [Abbas] decision does not apply to the PLC since it is not one of the PLO's institutions.

The president's move to adopt a new election law was also criticized by the PCHR in Gaza. In a press release issued on 4 September 2007, they argued that Art 43 concerning the prerogative of the president to issue decrees with the power of law in cases of necessity did not apply as the decision did not fill a legal vacuum, but was used to cancel an efficient law. They further argued that it is for the PLC to cancel or mend legislation, not the president: “Thus, this article (43) should not be employed to usurp the powers of the legislature by the executive under the pretext that the PLC is not convened.”<sup>382</sup> The failure of the PLC to convene was also criticized from the smaller parties. Pending the failure to grant confidence to the Fayyad cabinet, PLC member Mustafa Barghouti (al-Mubadara<sup>383</sup>) urged PLC members to attend the session. He warned that a continued boycotting of sessions would lead to a marginalizing of the role of the PLC. He was not heard.<sup>384</sup>

As the summer and early fall went by without the PLC being able to form a quorum. Hamas alone would have been able to form a quorum were it not for the fact that 41 of their parliamentarians had been jailed in a series of operations beginning with Israel's Operation Summer Rain in Gaza in the summer of 2006.<sup>385</sup> During the fall of 2007 Hamas unilaterally changed the PLC Standing Orders by adding a rule that authorizes jailed PLC members to vote by attorney. Art 7 of the Standing Orders does in fact state that “every parliamentary block shall have the right to set its own internal by-laws, provided that they do not contradict with the provisions of this standing orders and law”. However, Art 114 states that the Standing Orders can only be amended after a proposal submitted either by the PLC speaker or one third of the council. It would further have to be passed with an absolute majority of the whole PLC. As the council has not been able to meet the quorum in the first place, Hamas amended the Standing Order unilaterally and with a minority vote.<sup>386</sup> Nonetheless, Hamas argues they have legitimately created a rule that allows jailed members to authorize delegates to vote on their behalf on the PLC, thus allowing Hamas parliamentarians to meet the quorum and review the president's decisions.

---

<sup>382</sup> PCHR, “PCHR Position on the Presidential Decree on the Election Law,” press release. Ref: 115/2007, 4 September 2007, Gaza, <http://www.pchrgaza.org/files/PressR/English/2007/115-2007.html> (last accessed 19 January 2008).

<sup>383</sup> Al-Mubadara part of the so-called third current within Palestinian politics. Al-Mubadara aims to represent an alternative agenda to that of Fatah and Hamas and promotes democracy as a matter of national importance. Martin Bergsbakk Holter, “Al-Mubadara - Third Current Politics of the Second Intifada,” 7, 93-95.

<sup>384</sup> *Maan*, “PLC vote-of-confidence session fails”.

<sup>385</sup> According to International Crisis Group, 46 parliamentarians were in Israeli jails as of August 2007. Of these, 41 were from Hamas. ICG, “After Gaza,” 2, 17.

<sup>386</sup> Nathan Brown, e-mail, 11 December 2007.

Whereas the deposed Prime Minister Haniyeh deemed the meeting a “historic” sign that the PLC had “succeeded to ... counter the Israeli occupation’s policies”, PLC Secretary-General Ibrahim Khreisha denounced the session as an illegal move to “dedicate the rule of authority gained through military coup and inter-Palestinian division.”<sup>387</sup> One of the first decisions made by the Hamas led PLC was to declare all the president’s decrees to be illegitimate.

### ***A complete reversal***

The quarrel between the president and the prime minister was deeply rooted in the Basic Law in the sense that both parties legitimized their actions by referring to them as “constitutional” while accusing the other of being “unconstitutional”. Abbas advisers lay claim to various “constitutional rights” on behalf of the president, whereas the deposed Haniyeh cabinet in Gaza has based its rule on the military takeover in Gaza by the Executive Force. Neither of the two cabinets can claim constitutional legitimacy. However, in the constitutional disagreements between the president and the cabinet, Hamas’ positions have generally been more attuned to the Basic Law. This is due to the Basic Law’s constitutionalist limitations on the presidency and the strong role awarded to the cabinet and the PLC, where Hamas held the majority. All constitutional options open to the president would require a compromise with Hamas.<sup>388</sup>

Consequently, Hamas had a stronger interest than Fatah in ensuring that intra-executive and executive-legislative dealings took place within the provisions of the Basic Law. This was evident from the changes that were made from the first to the second version of the Prisoner’s Document. The 11 May version states that there should be “regular meetings” between the government and the presidency “to settle any disputes that might arise through brotherly dialogue based on the temporary constitution and for the sake of the higher interests...” By contrast, the 28 June version called for “regular meetings to achieve and reinforce cooperation and integration according to the provisions of the Basic Law and the higher national interests”. Hamas had less to gain in downplaying the Basic Law in favor of “brotherly dialogue” based on creative interpretations of the “preliminary constitution”. Fatah pursued their interest by promoting interpretations that favored the presidency, while Hamas emphasized articles that protected the role of the PLC, where they represented the majority.

After the 2006 elections, the corrosion of the 2003 amendment accelerated as the presidency was reinforced beyond the limits of the Basic Law. Abbas claimed power of initiative in calling for referendums, issued decrees while the PLC was in session, installed a caretaker

---

<sup>387</sup> *Maan*, “Hamas lawmakers convene Palestinian Legislative Council; Fatah boycotts meeting,” 11 July 2007, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=26174> (last accessed 18 January 2008).

<sup>388</sup> Brown, “What can Abu Mazin do?” 4-5.

cabinet without requiring it to obtain PLC confidence, and revoked the Law of Elections and imposed a new elections law by decree. Concurrently, the presidency was reinforced by financial support, international backing and material support for the Presidential Guard. The international community has been generally supportive how Abbas, his advisers and the PLO Executive Committee have interpreted the Basic Law.<sup>389</sup> However, as the conflict escalated, also Hamas were willing and able to bend the rules to their own advantage. Allowing imprisoned Hamas members to vote by proxy, which had never been legal according to Palestinian law, was one example to that.<sup>390</sup> The establishment of a parallel PLC in Gaza can only contribute to maximize the persistent confusion and institutional duplication.

Ottaway has argued that significant reforms must challenge fundamental assumptions about power and have the potential to bring about a paradigm shift.<sup>391</sup> A significant result of the 2003 amendment would have shifted the power of initiative from the presidency to the cabinet. However, after the elections, the president was able to move forward as a main engine in Palestinian politics. The constitutional debates concerned whether or not referendums were possible within the Basic Law, or whether parliament could be dissolved. Few questioned whether the underlying logic of the Amended Basic Law permitted the right of initiative to lie with the president in such cases. Palestinian politics in the West Bank is currently conducted much along the lines of the nonconstitutionalist presidency envisioned in the early PLO drafts of the Basic Law, with the PLO as “the higher reference” and a president who “exercises his powers through Resolutions and Decrees” (Art 57, 1994 PLO draft). We also see attempts at implementing some of the proposals that the PLC had rejected in 2005, such as conducting referendums, and dissolving the PLC.

Palestinian constitutional development from 2003 until 2006 fits the pattern of liberalization described by Adam Przeworski as “a process whereby the power apparatus allows some political organization and interplay of interests but maintains intact its own capacity to intervene [...] Liberalization is a controlled opening of the political space, continually contingent upon the compatibility of the outcomes of politics with the interests or values of the authoritarian

---

<sup>389</sup> Brown, “Requiem for Palestinian Reform,” 10-11.

<sup>390</sup> The more serious constitutional breaches conducted by Hamas are related to the Judiciary, which fall outside the scope of intra-executive relations and is not dealt with in this thesis. For further detail, consult Palestinian Center for Human Rights (PCHR), “Establishing the Higher Justice Council is Illegal and Usurps the Authority of the Higher Judicial Council,” press release, Ref: 127/2007, 24 September 2007 <http://www.pchrgaza.org/files/PressR/English/2007/127-2007.html> (last accessed 19 January 2008); and “Appointments in the Attorney-General’s Office in Gaza are a Continuation of Illegal Measures,” press release, Ref: 123/2007, 19 September 2007, <http://www.pchrgaza.org/files/PressR/English/2007/123-2007.html> (last accessed 19 January 2008).

<sup>391</sup> Ottaway, “Evaluating Middle East Reform,” 9.

power apparatus.” Under such circumstances, the potential of the Basic Law to bring about the transfer of power from a group of individuals to a set of rule remains extremely limited.

Meaningful reform in a Palestinian context would have implied the transfer of power from individuals to institutions. Adam Przeworski has argued that democracy is a form of *political organization* where power is “devolved from a group of people to a set of rules”, and where “no one can be certain that their interests will ultimately triumph”.<sup>392</sup>

Constitutions have the potential to provide for, but also to prevent, this organizational form. When Palestinian reform has not led to the transfer of power from groups and individuals to institutions, the fault is not in the Basic Law, but in the political context. Reform has been a way of bolstering individuals by temporarily vesting power in the institutions that have been controlled by these individuals. Under authoritarian rule, there is always an individual, an organization, party or group with an “effective capacity to prevent political outcomes that would be highly adverse to their interests.” The electoral victory of Hamas in 2006 was such an “adverse” outcome. Political actors both within and outside of the PA had the will and exercised their power to reverse the outcome of political processes that were perceived as detrimental to their interests. Power was retransferred to the presidency, because this office at the time was inhabited by a moderate.

Ottaway has pointed out that international involvement in reforms tend to promote cosmetic rather than significant reform, as: “It is the distant actors that may be satisfied with façade changes.”<sup>393</sup> Constitutional development in the PA confirms this contention. By pressing reforms only when it has been politically advantageous and otherwise ignoring constitutional issues the international community effectively contributed to the subversion of significant reform within the PA. The Palestinian cabinet is now completely dependent on and appointed by the president. This situation is a far cry from the empowered reform cabinet provided for in the Amended Basic Law. Political concerns led the international society to completely disregard the 2003 reform and isolate the Palestinian cabinet. In supporting the caretaker cabinet of Fayyad, the international community also abandoned the principle of parliamentary confidence. Large parts of the political coalition that had made the 2002-2003 reforms possible – that is the US, the EU and parts of the Fatah leadership have realigned to “rebuild an unfettered presidency”.<sup>394</sup>

---

<sup>392</sup> Adam Przeworski, “Democracy as a contingent outcome of conflicts,” in *Constitutionalism and Democracy*, eds. Elster and Slagstad, 61-63.

<sup>393</sup> Ottaway, “Evaluating Middle East Reform,” 11.

<sup>394</sup> Brown, “Requiem for Palestinian Reform,” 13.

## SUMMARY PART III

After the 2006 elections, the influence of power politics on Palestinian constitutional development changed its nature from legislative drafting to the interpretation of the constitutional texts. As long as Fatah had a majority in the PLC, they had been able to ingrain their interests and values in the legislative framework. As a minority in the PLC, they were no longer able to do so. Focus shifted to obtaining hegemony in the interpretation of the Basic Law. This was evident in the effort invested in passing the High Constitutional Court Law after the election results were declared. By introducing last minutes changes that allowed the president to appoint judges without PLC approval, Fatah obtained a tool that could potentially enable them to wield considerable influence. The measure would allow Abbas to compose a constitutional court that would be likely to interpret the Basic Law in favor of the president's opinion. Although the High Constitutional Court was not activated, constitutional issues have been hotly debated since the 2006 elections.

With the isolation of two successive PA cabinets the PLO Executive Committee asserted itself as a constitutional interpreter by forming committees to study the Basic Law and making public calls for dismissing the cabinet and dissolving parliament. The international community consistently backed Abbas' and the PLO Executive Committee's interpretations of the Basic Law. These interpretations place the right of initiative in a number of issues with the president and allocate all residual powers with the president. It is hard to see how this support is founded in the actual constitutional texts.

When the spirit of this amendment was no longer concurrent to the interests of the majority within Fatah and the international community, the reforms were gradually reversed. After Fatah's electoral loss in 2006 it was no longer possible to do so by passing constitutional amendments in parliament. Instead, a massive effort was launched to establish an interpretation of the Amended Basic Law that completely disregarded the institutional aspect of the 2003 reform. Abbas initially worked to complete the reform effort, but the decision of Hamas to run for elections led Fatah and the international society to go against the reforms that they had earlier pressed for. The result has been the return to a nonconstitutionalist presidency with a president who acts independently from the Basic Law and a prime minister who is not accountable to a functioning PLC, but to the president who appointed him. Palestinian institutions have moved outside of all legal channels. To be sure, the the Basic Law was frequently referred to as a legitimizing tool, but when Abbas moved beyond the limitations of his prerogatives, few ventured to press the point that these limitations had been constitutionally imposed and should be adhered to irrespective of who was president at any given time.



## **Main conclusion: The civilizing force of hypocrisy?**

This thesis has aimed to discuss how the convergence of international and domestic interests has influenced Palestinian constitutional development. Focus has been on the nature of the executive branch and how intra-executive relations evolved after the 2003 amendment of the Basic Law. The main questions were whether the PA has evolved in the direction of constitutionalist or nonconstitutionalist rule and whether the 2003 constitutional amendment constituted part of a significant or a cosmetic reform.

Political actors within and outside the PA have pursued three constitutional strategies to realize their goals: influencing, ignoring and interpreting the legislative framework. Before the establishment of an elected legislative council in 1996, the PLO initially sought to draft a Basic Law that would maximize executive flexibility and create a weak parliament with a vaguely defined role. As the drafting proceeded over the 1990s and the PLO lost control of the drafting process to the PLC, the Basic Law gradually evolved in the direction of stronger constitutionalism by imposing gradually stronger and more defined limitations on the executive. The constitutionalist nature of the Basic Law led the Palestinian leadership to ignore it, and the legislation was not ratified until 2002.

After less than a year, the Basic Law was amended as part of a broader reform effort to empower the cabinet, enhance fiscal transparency and consolidate the security forces in three branches. The international community had pushed for this reform, partially because the donor community wanted to see their funding put to better use, and partly because Arafat was no longer perceived as a moderate and constructive force in Palestinian politics. This affected the priorities that were set. Although the reforms responded to demands from the Palestinian reform camp, the external support for the reform drive was not motivated by the lack of constitutional rule, but by the PA's inability to exercise a monopoly of arms. Whereas the internal reform coalition wanted to render Arafat more accountable, the external reform coalition wanted to usurp his power to the greatest extent possible. With the 2003 constitutional amendment, a prime minister was established, and power was redistributed within the executive in favour of the cabinet. This shifted the axis of conflict from the president versus parliament to the president versus the cabinet.

Arafat actively sought to render the reform cosmetic by appearing to accept the amendment while obstructing the practical consequences of the transformation from a presidential to a semi-presidential system. In 2004, President Arafat died and was replaced by Mahmoud Abbas, who was perceived as a moderate Palestinian in the West, and there was no obvious advantage in pressing for limitations on his presidential powers. Under both Arafat and Abbas,

parliament and the cabinet generally backed down in conflicts with the president and did not make full use of the constitutional tools provided to them by the Basic Law. Cabinet power was infringed upon by the president as well as by powerful figures within the bureaucracy and the security apparatus. After the amendment, a series of prime ministers and cabinet ministers proved unable or unwilling to perform as an “empowered” reform cabinet.

After the death of President Arafat in 2004, his successor, Mahmoud Abbas, emerged as the main promoter of reform. Among others, he initiated an effort to complete important pieces of legislation relating to the judiciary, the diplomatic services and the security sector. His ability to promote reform was, however, diluted by the continued power struggles within Fatah and the gradual realization that Fatah would be exposed to severe competition within the institutions that they had previously dominated. Due to the politicized agenda that underlay the reform in the first place and the controversial foreign policy agenda of Hamas, there was no external backing to continue the reforms. In the balance between adherence to democratic ideals and security needs, the international community had long vacillated between supporting the PLC, while at the same time demanding executive actions that were not rooted in the parliamentary process. Neither before nor after the death of President Arafat was the 2003 amendment able to affect a redistribution of powers or make power subject to a popular mandate. Hence, the amendment cannot be seen as part of a significant reform. The erosion of the 2003 reform, acutely expressed in the proposals to reinforce the presidency by way of an amendment the Basic Law in 2005, shows a lack of commitment to one constitutional project.

This might have changed dramatically in 2006, when Fatah lost the parliamentary majority to Hamas. The fact that the Islamic opposition could legally win a parliamentary election in the Arab world underscores that Palestinian constitutional law itself does not prevent the emergence of a competitive political environment where “everyone must subject their interests to competition and uncertainty.”<sup>395</sup> Unlike the first PLC, the second PLC challenged the president on many occasions. In order to compensate for their lost dominance of the PA apparatus, the Fatah power elite for their part realigned within the PLO and rallied behind the president. From that moment on, the 2003 amendment was actively reversed by Abbas and the PLO Executive Council. Strategies to influence constitutional development shifted from affecting the Basic Law as a text into establishing a favorable interpretation of it. Hamas pursued interpretations that would be favorable to the cabinet and the PLC. Fatah pursued interpretations that favored the presidency. In this they were supported by the international community. By boycotting the PA

---

<sup>395</sup> Przeworski, “Democracy as a contingent outcome of conflicts,” 62.

while redirecting the flow of finance directly to the President and a PLO account administered by Salam Fayyad the international community actively reversed former reforms aimed at empowering the cabinet. Personalization of politics was directly encouraged by the international community, who dealt with Mahmoud Abbas in whatever capacity was feasible. The need to secure donor funds necessitated the continued vacillation between sources of legitimacy that had been the hallmark of Arafat's ruling strategy.

In public discourse, the 2002-2003 reforms were portrayed as promoting democracy, but Palestinian constitutional development indicates that the concept of democracy needs to be detached from the concept of institution building, of which constitution making forms a vital part. An analysis of the actual content of the 2003 amendment and the Roadmap will indicate that these reforms were aimed at organizing and enhancing state power in the face of (armed) opposition groups who did not share the political vision for Palestine espoused by Fatah, the international community and Israel. Reform has also been aimed at strengthening different parts of the elite, more specifically Fatah and nonviolent secular movements within political life and the NGO sector.

In a regional historical perspective, these goals conform to Brown's description of nonconstitutionalist Arab constitutions that were drafted in the face of strong external pressure or pre-independence. Achieving these goals would not necessarily lead to nonconstitutionalist rule, but they would also not preclude it. The political context surrounding the PA provided many incentives for nonconstitutionalist rule, and even though the Basic Law had strong constitutionalist potential, the targeted areas for reform did not include mechanism that would maximize constitutionalism and minimize nonconstitutionalism. Reforms of the existing constitutional framework aimed to redistribute of power within the executive and did not pertain to the prerogatives of the PLC. Furthermore, the 2002-2003 reforms that motivated the 2003 amendment could not and did not intend to solve the core problem of lacking internal democracy within Palestinian political institutions. This means that the cabinet remained weak in the face of opposition from powerful groups and individuals on the domestic scene who refused to relinquish their positions. Another reason is that neither the traditional ruling party nor the international community respected the outcome of the electoral process that did find place. Assuming that the target was to professionalise Palestinian institutions by creating an "empowered reform cabinet", the result has been the opposite. The West Bank and Gaza are currently effectively split, Palestinians are on the brink of civil war, the economy is on the verge of collapse, the PLC is dysfunctional, and there is a strong case for arguing that none of the two self proclaimed cabinets are ruling on any sort of constitutional platform.

One of Abbas' incentives to persuade Hamas to participate in parliamentary elections in 2006 had been the notion that once they were part of the legislative process they would not ignore the laws that resulted from this process. After Hamas came to power, it became evident that they had made themselves acquainted with the constitutional framework, and that they intended to use it for leverage. An emerging consensus to adhere to the Basic Law was also evident in the Prisoner's Document, which emphasized that "higher national interests call for respecting the 'Basic Law' of the PNA". If conflict is seen as vital to develop and nurture acceptance for a constitutional framework, this was a genuine opportunity for constitutionalism to take root within the PA. At this point, international influence over Palestinian constitutionalism turned from inconsistency to obstruction. External boycott and the direct support of the presidency and the Presidential Guard eventually tipped the scale in favor of Abbas and his Fatah party.

One of the great obstacles to constitutionalist rule in the PA has been the will to ignore the Basic Law by either operating outside legal channels or evoking parallel sources of legitimacy, such as the PLO. I have pointed out that the president, the cabinet and the security forces all tried to influence the legal framework by contributing to draft laws. For a variety of reasons, not to mention the practical hurdles of the occupation, the legislative process in the PA has not been very efficient. But even in instances where politically relevant elites have been able to complete relevant pieces of legislation, they have not pressed for the implementation of these laws. Examples are the High Constitutional Court Law, which in spite of all the bravado surrounding its completion, has not resulted in the activation of such a court. Another example is the 2003 amendment, which the international community gradually abandoned after Arafat's death in 2004. Lastly, the efforts of the security forces to integrate in the legislative framework that they are to report to the president indicates that they are not oblivious to the potential importance of legislation, even though the security chiefs have been the first to ignore it.

The result of the 2006 elections would make it impossible to ignore constitutional issues in this way. As the conflict between the president and the cabinet played out, it became clear that Hamas was well versed in Palestinian constitutional law. In the media there were frequent reports of arguments from various figures within the PLC, the PLO and the presidency relating to constitutional matters. Jon Elster has written about the *civilizing force of hypocrisy*. The concept refers to the idea that actors who are discussing under public scrutiny may be forced or induced to "refrain from the most blatant expressions of self-interests."<sup>396</sup> Elster also points out that "a perfect match between an obvious private interest and an impartial equivalent will often be perceived as

---

<sup>396</sup> Elster et. al., *Institutional Design in Post-Communist Societies*, 77-78.

too crude to be taken seriously.” In this thesis, I have not just presented the parties’ arguments. I have also made the case that Hamas positions were to a larger extent than Fatah’s founded in the Basic Law and the 2003 amendment. Once entrenched in the PA, it was easier for Hamas to find plausible equivalents between the Basic Law and their interests as a movement and as the dominant forces in the cabinet and the parliament. In Fatah’s case plausible impartial equivalents were to a lesser extent to be found in the Basic Law.

To my opinion, three instances were particularly crude. One was the notion that the PLC could be dismissed by way of early elections. The other was the installing of a new cabinet without parliamentary confidence, and the third was the imposition of a new electoral law by decree. In these instances it was argued that the constitutional framework was unclear or that it contained loopholes, when in fact it was clear. The result has been the return to a nonconstitutionalist presidency with a president who acts independently from the Basic Law and a prime minister who is not accountable to a functioning PLC. The situation led second PLC deputy speaker Hassan Khreisha (Independent) to conclude that: “There is no longer anything legal in the Palestinian arena, the only legal entity which remained was the PLC. However, the PLC has now fallen prey to the Hamas – Fatah disagreement.”<sup>397</sup>

It is not unreasonable for politicians to seek legitimacy for their actions by resorting to constitutional law – on the contrary, I find it highly promising that they did. With each public reference to the Basic Law, the cost of ignoring it was increased. Once Abbas threatened to dismiss the prime minister as it was his constitutional prerogative to do so, he started walking down “the slippery slope”, whereby an orchestrated reform effort may have unintended consequences.<sup>398</sup> Whether or not Fatah would have accepted their defeat had it not been for international backing of their movement and direct pressure on Abbas to sideline the cabinet we will never know. Consequently, the full potential of the Basic Law has never been tested. In conclusion, domestic power struggles and external interests have converged in such a way as to produce de-institutionalization, personalization and cosmetic reform in the PA.

---

<sup>397</sup> *Maan*, “Second-deputy of the PLC condemns Abbas’ attempts to impose laws on the decision-making body,” 15 August 2007, <http://www.maannnews.net/en/index.php?opr=ShowDetails&ID=24735> (last accessed 18 January 2008).

<sup>398</sup> Ottaway, “Evaluating Palestinian Reform,” 9.

# Bibliography

## Documents

*The Israeli Palestinian Interim Agreement.* Washington, D.C., 28 September 1995. Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> (last accessed 15 February 2008).

*Third Draft Basic Law For the National Authority in the Transitional Period.* PNC Legal Committee, 1 May 1994. Jerusalem Media and Communication Centre (JMCC), <http://www.jmcc.org/politics/pna/basic1.htm> (last accessed 13 December 2007).

*Fourth Draft Basic Law For the National Authority in the Transitional Period.* PNC Legal Committee, 11 December 1995. JMCC, <http://www.jmcc.org/politics/pna/basic2.htm> (last accessed 13 December 2007).

*Standing Orders for the Palestinian Legislative Council.* Non Official translation by ARD PLC Project. USAID, [http://www.usaid.gov/wbg/misc/standing\\_orders\\_revised\\_2.pdf](http://www.usaid.gov/wbg/misc/standing_orders_revised_2.pdf) (last accessed 19 January 2008).

*The Basic Law.* Ramallah, 2 October 1997. Miftah, <http://www.miftah.org/Display.cfm?DocId=790&CategoryId=7> (last accessed 13 December 2007).

*A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict.* Washington, 30 April 2003. Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm> (last accessed 20 January 2008).

*The Third Draft Constitution for a Palestinian State.* Translation and Commentary by Nathan J. Brown. Palestinian Center for Survey and Policy Research (PSR), Ramallah, October 2003. Retrieved from PSR, <http://www.pcpsr.org/domestic/2003/nbrowne.pdf> (last accessed 18 January 2008).

*The Amended Basic Law.* Ramallah, 2003. Bir Zeit Institute of Law: The Palestinian Legal and Judicial System “al-Muqtafi”, <http://muqtafi.birzeit.edu/mainleg/14138.htm> (last accessed 13 December 2007).

*The Cairo Declaration.* Cairo, 17 March 2005. United Nations Information System on the Question of Palestine, <http://domino.un.org/UNISPAL.NSF/d80185e9f0c69a7b85256cbf005afeac/69b9d56df48732c48525708a0053358b!OpenDocument> (last accessed 18 November, 2007).

*A draft law amending the Basic Law – 2003.* The Palestinian Legislative Council, The Tenth term, first round, The first session/13th meeting, Gaza, 2005. Palestinian Basic Law, <http://www.palestinianbasiclaw.org/wp-content/uploads/2008/02/2005-proposals.pdf> (last accessed 17 February 2008).

*Elections Law no. 9 of 2005.* PLO and the PA, Gaza, 13 August 2005. Central Elections Commission, [http://www.elections.ps/pdf/Elections\\_Law\\_No\\_9\\_of\\_2005\\_EN.pdf](http://www.elections.ps/pdf/Elections_Law_No_9_of_2005_EN.pdf), (last accessed 16 February 2008).

*The Basic Law of 2005 A.D. Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003.* PLC, Gaza, 2005, “al-Muqtafi”. Internet Archive Wayback Machine, <http://web.archive.org/web/20070608180556/http://muqtafi.birzeit.edu/data/txt/2005/14860.htm> (last accessed 13 December 2007).

*National Conciliation Document of the Prisoners.* First version, 11 May 2006. JMCC, <http://www.jmcc.org/documents/prisoners.htm> (last accessed 19 January 2007).

*National Conciliation Document of the Prisoners.* Second version, 28 June 2006. JMCC, <http://www.jmcc.org/documents/prisoners2.htm> (last accessed 19 January 2008).

*Presidential decree no. () for 2006, on holding a referendum on the Prisoners’ Document.* PLO and the PA, Ramallah, 10 July 2006. JMCC, <http://www.jmcc.org/documents/referendum.htm> (last accessed 4 January 2007).

*The Mecca Agreement.* Mecca, 8 February 2007. JMCC, <http://www.jmcc.org/documents/meccaagree.htm> (last accessed 19 January 2008).

*A decree issued by a law number ( ) of 2007, pertaining the general elections.* PLO and the PA, 2 September 2007. Translation provided by IFES (formerly International Foundation for Election Systems). Palestinian Central Elections Commission, [http://www.elections.ps/pdf/Election\\_Law\\_\(2007-Sept\\_02\)-EN.pdf](http://www.elections.ps/pdf/Election_Law_(2007-Sept_02)-EN.pdf) (last accessed 19 January 2008).

## **Speeches in chronological order**

George W. Bush, “President Bush Calls for New Palestinian Leadership.” Office of the Press Secretary, Washington, 24 June 2002 <http://www.whitehouse.gov/news/releases/2002/06/20020624-3.html> (last accessed 12 February 2008).

Mahmoud Abbas, “Resignation speech to the Palestinian Council.” *Journal of Palestine Studies*, Vol. 33, No 2 (Winter 2004), Ramallah, 6 September 2003. 169.

Condoleezza Rice, Press Availability After Middle East Quartet Meeting, United Nations Headquarters, New York City, 20 September 2005. U.S. Department of State, <http://www.state.gov/secretary/rm/2005/53612.htm> (last accessed 20 February 2008).

Condoleezza Rice, Questions Taken at Princeton University's Celebration of the 75th Anniversary Of the Woodrow Wilson School of Public and International Affairs, Princeton University, New Jersey, 30 September 2005. U.S. Department of State, <http://www.state.gov/secretary/rm/2005/54178.htm> (last accessed 20 February 2008).

Mahmoud Abbas, “Speech in the opening session of the 2nd PLC”. Ramallah, 18 February 2006. JMCC, <http://www.jmcc.org/documents/abbasspeech2ndplc2.htm> (last accessed 19 January 2008).

## **Books, articles and chapters in books**

Abu Amr, Ziad. “The Palestinian Legislative Council: A Critical Assessment”, *Journal of Palestine Studies*, Vol. 26, No. 4, Summer, 1997: 90-97.

Aruri, Naseer and John J. Carroll. “A New Palestinian Charter”. *Journal of Palestine Studies* Vol. 23, No. 4, Summer 1994: 5-17.

- Badawi, Ahmed. "Policy Failure, Power Relations and the Dynamics of Elite Change in Palestine," *Orient*, No 4, 2003: 555-577. Also available from Miftah (The Palestinian Initiative for the Promotion of Global Dialogue & Democracy), <http://www.miftah.org/PrinterF.cfm?DocId=4406> (last accessed February 12 2008).
- Bergström, Göran and Kristina Boréus, eds. *Textens mening och makt*, second edition. Lund: Studentlitteratur, 2005.
- Brynen, Rex. The Neopatrimonial Dimension of Palestinian Politics. *Journal of Palestine Studies*, Vol. 25, No 1, autumn 1995: 23-36.
- Brown, Nathan J.. *Constitutions in a Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government*. Albany: State University of New York Press, 2002.
- \_\_\_\_\_. *Palestinian Politics after the Oslo Accords: Resuming Arab Politics*. Berkeley: Unity of California Press, 2003.
- \_\_\_\_\_. "Regimes Reinventing Themselves: Constitutional Development in the Arab World". *International Sociology*, Vol. 18, No. 1, March 2003: 33-52.
- Carothers, Thomas and Ottaway, Marina, eds. *Uncharted Journey: Promoting Democracy in the Middle East*. Washington: Carnegie Endowment for International Peace, 2005.
- Chan, Kenneth Ka-Lok. "Idealism versus Realism in Institutional Choice: Explaining Electoral Reform in Poland". *West European Politics*, Vol. 24, No. 3, July 2001: 65-88.
- Dajani, Burhan, "The September 1993 Israeli-PLO Documents: A Textual Analysis". *Journal of Palestine Studies*, Vol. 23, No. 3, Spring 1994: 5-23.
- Diamond, Larry and Plattner, Mark F., eds. *The Global Resurgence of Democracy*. Baltimore: The Johns Hopkins University Press, 1996.
- Elgie, Robert, "Semi Presidentialism: Concepts, Consequences and Contesting Explanations". *Political studies Review*, Vol. 2, No. 3, September 2004: 314-330.
- Elster, Jon; Offe, Claus; Preuss, Ulrich K.; Boenker, Frank; and Goetting, Ulrike, and Rueb, Friedbert W. *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press, 1998.
- Elster, Jon and Slagstad, Rune, eds. *Constitutionalism and Democracy*, third edition, Studies in Rationality and Social Change. Cambridge: Cambridge University Press, 1988, 1997.
- Friedrich, Roland. *Security Sector Reform in the Occupied Palestinian Territories*. Jerusalem: Palestinian Academic Society for the Study of International Affairs, 2004.
- Ghanem, As'ad. *The Palestinian Regime: A "Partial Democracy"*. Brighton: Sussex Academic Press, 2001.
- Grugel, Jane. *Democratization: A Critical Introduction*. Hampshire: Palgrave Macmillan 2002.
- Giacaman, George and Lønning, Dag Jørund, eds. *After Oslo: New Realities, Old Problems*, edited by George Giacaman and Dag Jørund Lønning. London: PLUTO Press, 1998.
- Jarbawi, Ali. "Palestinian Politics at a Crossroads". *Journal of Palestine Studies*, Vol. 25, No. 4, Summer 1996: 29-39.



- Khan , Mushatq Husain, Giacaman, George and Amundsen, Inge, eds. *State Formation in Palestine: Viability and Governance during a Social Transformation*. New York: RoutledgeCurzon, 2004.
- Horowitz, Donald L. "Constitutional Design: Proposals Versus Processes," in *The Architecture of Democracy*, edited by Andrew Reynolds. Oxford: Oxford University Press, 2002: 15-36.
- Kjeldstadli, Knut. *Fortida er ikke hva den en gang var: En innføring i historiefaget*. Oslo: Universitetsforlaget, 1992.
- Klein, Menachem. "By Conviction, Not By Infliction: The Internal Debate Over Reforming the Palestinian Authority". *Middle East Journal*, Vol 57, No 2, spring 2003: 194-212.
- Klug, Heinz. *Constituting Democracy: Law, Globalism and South Africa's Reconstruction*. Cambridge: Cambridge University press, 2000.
- Mishal, Shaul and Sela, Avraham. *The Palestinian Hamas: Vision, Violence and Coexistence*. New York: Columbia University Press, 2000.
- Parsons, Nigel. *The Politics of the Palestinian Authority: From Oslo to al-Aqsa*. New York: Routledge Taylor & Francis Group, 2005.
- Protsyk, Oleh. "Intra-Executive Competition between President and Prime Minister: Patterns of Institutional Conflict and Cooperation under Semi-Presidentialism," *Political Studies*, Volume 54, No 2, June 2006: 219-244.
- Robertson, David. *The Routledge Dictionary of Politics*, third edition. London: Routledge Taylor & Francis Group, 2004.
- Robinson, Glenn E., *Building a Palestinian State: The Incomplete Revolution*, Indiana Series in Arab and Islamic Studies. Bloomington: Indiana University Press, 1997.
- Rubin, Barry, *The Transformation of Palestinian Politics: From Revolution to State-Building*. Cambridge: Harvard University Press, 1999.
- Rubin, Herbert J. and Rubin, Irene S. *Qualitative Interviewing: The Art of Hearing Data*, second edition. Thousand Oaks: Sage Publications, 2005.
- Sartori, Giovanni. *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, second edition. New York: New York University Press, 1994, 1997.
- Sayigh, Yezid. *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993*. Oxford: Oxford University Press, 1997.
- Shikaki, Khalil. "The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine". *Journal of Palestine Studies*, Vol. 25, No. 2, Winter 1996: 5-20.
- Shikaki, Khalil and Shueibeh, Azmeh. "A Window on the Workings of the PA: An Inside View," *Journal of Palestine Studies*, Vol. 30, No 1, Autumn 2000: 88-97.
- Siaroff, Alan, "Comparative presidencies: The inadequacy of the presidential, semi-presidential and parliamentary distinction". *European Journal of Political Research*, Vol. 42, No. 3, May 2003: 287-312.
- Sunstein, Cass R. *Designing Democracy: What Constitutions do*. Oxford: Oxford University Press, 2001.

Teitel, Ruti. "Transitional Jurisprudence: The Role of Law in Political Transformation". *Yale Law Journal*, Vol. 106, No. 7, May 1997: 2009-2080.

Wing, Adrien Katherine, "The Palestinian basic law: Embryonic constitutionalism". *Case Western Reserve Journal of International Law*, Vol. 31, No. 2&3, spring 1999: 383-426.

## Reports

Khalil, Asem. "Legislating for Migration: The Anomalous case of the Palestinian Authority". European University Institute, Robert Schuman Center for Advanced Studies. Florence: 2006. [http://www.iue.it/RSCAS/e-texts/CARIM-AS06\\_11-Khalil.pdf](http://www.iue.it/RSCAS/e-texts/CARIM-AS06_11-Khalil.pdf) (last accessed 18 January 2008).

Brown, Nathan J. "The Palestinian Reform Agenda". *Peaceworks* No. 48. United States Institute of Peace, Washington: December 2002. <http://www.usip.org/pubs/peaceworks/pwks48.pdf> (last accessed 20 January 2008).

\_\_\_\_\_. "Evaluating Palestinian Reform". *Carnegie Papers: Middle East Series*, No 59, The Carnegie Endowment, Democracy and Rule of Law Program. Washington: June 2005. <http://www.carnegieendowment.org/files/CP59.brown.FINAL.pdf>, (last accessed 20 January 2008).

\_\_\_\_\_. "What can Abu Mazin do?", web commentary, Carnegie Endowment for International Peace. Washington: 15 June 2007. <http://www.carnegieendowment.org/files/AbuMazinUpdateJune1507.pdf>, accessed 18 January 2008.

\_\_\_\_\_. "Requiem for Palestinian Reform: Clear Lessons from a Troubled Record". *Carnegie Papers: Middle East Series*, No 81. The Carnegie Endowment, Democracy and Rule of Law Program. Washington: February 2007. [http://www.carnegieendowment.org/files/cp\\_81\\_palestine\\_final.pdf](http://www.carnegieendowment.org/files/cp_81_palestine_final.pdf) (last accessed 20 January 2008).

Butenschøn, Nils and Vollan, Kåre (eds.). "Interim Democracy," *Human Rights Report*, No 7 2006. Norwegian Centre for Human Rights, University of Oslo: 1996.

\_\_\_\_\_. "Democracy in Conflict: Report on Elections for Local Councils, President, and Legislative Council in the Occupied Palestinian Territory 2004-2006," Nordem Special Report 2006, Norwegian Centre for Human Rights. University of Oslo: 2006. [http://www.humanrights.uio.no/forskning/publ/nr/2006/palestine\\_special\\_report.pdf](http://www.humanrights.uio.no/forskning/publ/nr/2006/palestine_special_report.pdf) (last accessed 20 February 2008).

International Crisis Group. "A Middle East Roadmap to Where?" *ICG Middle East Report*, No 14. Amman: 2 May 2003. [http://www.crisisgroup.org/library/documents/report\\_archive/A400962\\_02052003.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400962_02052003.pdf) (last accessed 20 January 2008).

\_\_\_\_\_. "Who Governs the West Bank? Palestinian Administration under Israeli Occupation". *ICG Middle East Report*, no 32. Amman: 28 September 2007. [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/32\\_who\\_governs\\_the\\_west\\_bank\\_palest\\_admin.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/32_who_governs_the_west_bank_palest_admin.pdf) (last accessed 20 January 2008).

\_\_\_\_\_. "Enter Hamas: The Challenges of Political Integration". *ICG Middle East Report*, No. 49. Amman: 18 January 2006. [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/49\\_enter\\_hamas\\_the\\_challenges\\_of\\_political\\_integration.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/49_enter_hamas_the_challenges_of_political_integration.pdf) (last accessed 20 January 2008).

- \_\_\_\_\_. “After Mecca: Engaging Hamas”. *ICG Middle East Report*, No 62. Amman: 28 February 2007. [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/62\\_after\\_mecca\\_\\_engaging\\_hamas.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/62_after_mecca__engaging_hamas.pdf) (last accessed 20 January 2008).
- \_\_\_\_\_. “After Gaza”. *ICG Middle East Report*, No 68. Amman: 2 August 2007. [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_\\_north\\_africa/arab\\_israeli\\_conflict/68\\_after\\_gaza.pdf](http://www.crisisgroup.org/library/documents/middle_east___north_africa/arab_israeli_conflict/68_after_gaza.pdf) (last accessed 20 February 2008).
- Ottaway, Marina. “Evaluating Middle East Reform: How Do We Know When It Is Significant?” *Carnegie Papers: Middle East Series*, No 56, The Carnegie Endowment, Democracy and Rule of Law Program. Washington: February 2005. <http://www.carnegieendowment.org/files/CP56.Ottaway.FINAL.pdf> (last accessed 22 January 2008).
- Palestinian Independent Commission For Citizens’ Rights. “The Status of Palestinian Citizens’ Rights During 2005”, *11<sup>th</sup> Annual Report*. Ramallah: 2006. [http://www.piccr.org/index.php?option=com\\_content&task=view&id=130&Itemid=187&lang=en](http://www.piccr.org/index.php?option=com_content&task=view&id=130&Itemid=187&lang=en), (last accessed 22 January 2008).
- \_\_\_\_\_. “The Status of Palestinian Citizens’ Rights During 2006”, *12<sup>th</sup> Annual Report*. Ramallah: April 2007. [http://www.piccr.org/index.php?option=com\\_content&task=view&id=163&Itemid=189&lang=en](http://www.piccr.org/index.php?option=com_content&task=view&id=163&Itemid=189&lang=en) (last accessed 19 January 2008).
- Samuels, Kirsti and Hawkins Wyeth, Vanessa. “State-Building and Constitutional Design after Conflict”. New York: 2006. [http://www.ipacademy.org/asset/file/83/IPA\\_RPT-STATE-BUILDING.pdf](http://www.ipacademy.org/asset/file/83/IPA_RPT-STATE-BUILDING.pdf) (last accessed 25 November 2007).
- Samuels, Kirsti. “Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies”, second draft, International IDEA Democracy Building & Conflict Management. Stockholm: 2006. <http://www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf>, (last accessed 25 November 2007).

## Conference papers and unpublished material

- Brown, Nathan J. “Mechanisms of Accountability in Arab Governance: The Present and Future of Judiciaries and Parliaments in the Arab World”. United Nations Development Program, Programme on Governance in the Arab Region. <http://www.undp-pogar.org/publications/governance/nbrown/potential.html> (last accessed 16 October 2007).
- Harb, Jihad and Shikaki, Khalil. “Towards a more open and inclusive political system: A return to a presidential system is a return to instability,” executive summary, policy paper by The Palestinian Center for Policy and Survey Research, Ramallah: October 2005. North South Institute, [http://www.nsi-ins.ca/english/pdf/PalestinePolicyBrief\\_Nov\\_05\\_Eng.pdf](http://www.nsi-ins.ca/english/pdf/PalestinePolicyBrief_Nov_05_Eng.pdf) (last accessed 18 November 2007).
- Holter, Martin Bergsbakk, “Al-Mubadara - Third Current Politics of the Second Intifada: Remobilizing politics in a de-powered Palestinian Authority,” unpublished Master Thesis, Department of Political Science (Oslo: University of Oslo, 2007), [http://www.duo.uio.no/publ/statsvitenskap/2007/60310/masteroppgaven\\_martinholter.pdf](http://www.duo.uio.no/publ/statsvitenskap/2007/60310/masteroppgaven_martinholter.pdf) (last accessed 11 February 2008).

Mushkelishvili, Marina. "Constitutional Changes in Georgia". Conference paper, Tbilisi State University, "Constitutional/Political Reform Process in Georgia, Armenia and Azerbaijan: Political Elite and Voices of the People" in Tbilisi in Georgia, 18-19 March 2005. International IDEA Democracy Building & Conflict Management, [http://www.idea.int/europe\\_cis/upload/Constitutional%20Changes%20in%20Georgia%20-%20eng%20changed-2.pdf](http://www.idea.int/europe_cis/upload/Constitutional%20Changes%20in%20Georgia%20-%20eng%20changed-2.pdf) (last accessed 25 November 2007).

## **Press releases**

Palestinian Center for Human Rights, "PCHR Expresses Reservations over the Final Session of the Outgoing Palestinian Legislative Council," Press Release, Ref: 20/2006, 16 February 2006 by Palestinian Centre for Human Rights, 16 February 2006. <http://www.pchrgaza.org/files/PressR/English/2006/25-2006.htm> (last accessed 18 January 2008).

Palestinian Centre for Human Rights "PCHR Seriously Concerned by the Closure of 103 NGO's," press release, Ref: 110/2007, 29 August 2007. <http://www.pchrgaza.org/files/PressR/English/2007/110-2007.html> (last accessed 19 January 2008).

Palestinian Centre for Human Rights "PCHR Position on the Presidential Decree on the Election Law," press release, Ref: 115/2007, 4 September 2007, Gaza. <http://www.pchrgaza.org/files/PressR/English/2007/115-2007.html>, accessed 19 January 2008.

Palestinian Centre for Human Rights, "Political Dialogue is the Only Solution to the PLC Crisis," press release, Ref: 158/2007, 11 November 2007, Gaza. <http://www.pchrgaza.org/files/PressR/English/2007/158-2007.html> (last accessed 19 January 2008).

## **Official websites**

Palestinian Ministry of Foreign Affairs, [www.mofa.gov.ps](http://www.mofa.gov.ps)

Palestinian Central Elections Commission, [www.elections.ps](http://www.elections.ps)

## **News media and electronic journals**

*Al Ahram Weekly Online*, <http://weekly.ahram.org.eg/>

*BBC Online*, <http://news.bbc.co.uk>

*The Electronic Intifada*, [www.electronicintifada.net](http://www.electronicintifada.net)

*Ha'aretz*, [www.haaretz.com](http://www.haaretz.com)

*The Jerusalem Post Online*, <http://www.jpost.com>

*The Jurist*, [jurist.law.pitt.edu](http://jurist.law.pitt.edu)

*Maan News Agency*, [www.maannews.net/en](http://www.maannews.net/en)

*The Middle East Report*, [www.merip.org](http://www.merip.org)

*Palestina*, [www.palestina.no](http://www.palestina.no)

*Palestinian Academic Society for the Study of International Affairs*, [www.passia.org](http://www.passia.org)

*The Palestinian Information Center*, [www.palestine-info.co.uk](http://www.palestine-info.co.uk)

*Policy Watch/PeaceWatch*, [www.washingtoninstitute.org](http://www.washingtoninstitute.org)

*Reuters*, [www.alertnet.org](http://www.alertnet.org)

*Washington Post*, [www.washingtonpost.com](http://www.washingtonpost.com)

*Xinhua, People's Daily Online*, [english.peopledaily.com.cn](http://english.peopledaily.com.cn)

## List of Interviews in chronological order

Mahdi Abdul Hadi, interview, Jerusalem, 27 June 2005.

Head of Palestinian Academic Society for the Study of International Affairs (PASSIA).  
Conducted in English.

Rawya al-Shawa, interview, Gaza, 28 June 2005.

Member of both the first and second PLC. Ran as independent in 1996 and was in 2006 part of Mustafa Barghouti's electoral list, Independent Palestine (al-Mubadara). Conducted in English.

Jamal Zaqout, Gaza, 29 June 2005.

Member of the National Islamic Forces Committee, Fida and the Geneva Group. Conducted in English.

Ghazi Hamad, Gaza, 30 June 2005.

Editor of opposition paper Al-Rizala and former leader of the Islamic Salvation Party, spokes man for the Ismail Haniyeh cabinet. Conducted in English.

Salah Abdel Shafi, interview, Gaza, 1 July 2005.

Director of the Economic Development Group in Gaza. Conducted in English.

Khalil Shaheen, interview, Gaza, 3 and 5 July 2005.

Head of the Economic and Social Rights Unit at the Palestinian Centre for Human Rights in Gaza. Conducted in English.

Ammal T. Hamad, Gaza 3 July 2005.

PLC Women and Children Unit. Fatah member. Recommended by Bertinussen. Hamad brought her own interpreter.

Issa Nashar, Gaza, 4 July 2005.

Hamas political leader in Rafah. Appointment set up by G. Hamad, who also interpreted.

Khalid Batsh, interview, Gaza, 5 July 2005.

Spokesman for Islamic Jihad in Gaza. Conducted with professional interpreter.

Ashraf Ajram and Talal Awqal, Gaza, 5 July 2005

Local journalists from al-Ayyam. Awqal interpreted for Ajram, whom I also met the day after with a professional interpreter.

Jarrar Qudwah, Gaza, 6 July 2005.

Director General, General Control Authority of the General Control Authority in Gaza..  
Conducted in English.

Hisham Abdl Razeq, Gaza 6 July

Fatah Revolutionary Council. Minister of Prisoners (1998-June 2002, October 2002-October 2003). Conducted with professional interpreter.

Sami Abu Zuhri, interview, Gaza 6 July 2006.

Hamas spokesman in Gaza. Recommended to me by Ziyad Abu Amr. Conducted with professional interpreter.

Adli Sadeq, Gaza, 8 July 2005.

Assistant Deputy Minister Ministry of Foreign Affairs in 2005 and columnist in Al-Hayat Al-Jadida. Fatah member. Conducted with professional interpreter.

- Mudar Qassis, Ramallah 11 July 2005.  
Director of Bir Zeit Institute of Law. Conducted in English.
- Bassem Ezbidi, interview, Ramallah, 13 July 2005.  
Associate researcher at MUWATIN in Ramallah and professor of political science in Najah University in Nablus. Conducted in English.
- Roland Friedrich, interview Ramallah, 14 July 2005 and e-mail 28 January 2007.  
Author of *Security Sector Reform in the Occupied Palestinian Territories*, PASSIA, Jerusalem 2004. Conducted in English.
- Sakhr Habash, Ramallah, 14 July 2005.  
Fatah Central Committee and Fatah Revolutionary Council. Conducted in English.
- Jihad Harb, Ramallah, 16 and 24 July 2005.  
Researcher at Palestinian Center for Policy and Survey Research in Ramallah. Harb brought his own interpreter.
- Azmeh Shueibeh, interview, Ramallah, 16 July 2005.  
Member of the first PLC for Fida. Minister of youth and sport from 1994 to 1996.  
Conducted in English.
- George Giacaman, Ramallah, July 16 2005.  
Cofounder and Director of Muwatin, the Palestinian Institute for the Study of Democracy in Ramallah. Conducted in English.
- Mohammad Yaghi, interview, Ramallah, 18 July 2005.  
Executive director of the Palestinian Center for Mass Communication, project manager for the Konrad Adenauer Foundation in Ramallah. Conducted in English.
- Mohammed al-Hourani, Ramallah, 18 July 2005.  
Member of the first PLC for Fatah. Member of the Fatah Revolutionary Council.  
Conducted in English.
- Hani al-Hassan, Ramallah, 19 July 2005.  
Fatah Central Committee. Minister of Interior (2002-2003). Commissioner of Fatah Office of Mobilisation and Organization in Ramallah. Conducted in English.
- Ahmad Sayyad, Ramallah, 20 July 2005.  
Chairman of the Palestinian Bar Association. Conducted in English.
- Qaddura Fares, interview, Ramallah, 21 July 2005.  
Member for Fatah in the first PLC. Minister without portfolio (2003-2005). Conducted in English.
- Ibrahim Barghouti, Ramallah, 21 July 2005.  
Director of Musawa, Palestinian Center for the Independence of the Judiciary and the Legal Profession. Barghouti brought his own interpreter.
- Abdul Jawad Saleh, interview, Ramallah, 23 July, 2005.  
Independent member of the first PLC. Minister of agriculture (1996 to 1998). Conducted in English.
- Khalida Jarrar, phone interview, September 2006.  
PFLP member of the second PLC.

# Appendix I Website of the Ministry of Foreign Affairs

Frontpage of the website the Palestinian Ministry of Affairs 18 January 2006, retrieved from The Internet Archive, <http://web.archive.org/web/20060118064206/http://www.mofa.gov.ps/> accessed 28 January 2008.

The “Background” section presenting the ministry as a regular foreign ministry had at this point remained unchanged since the summer of 2003, when the ministry was presented as Ministry of Planning and International Cooperation. (See “Background” as it appeared on 27 July 2003, and then again on 27 September, 2003, [http://web.archive.org/web/\\*/http://mofa.gov.ps](http://web.archive.org/web/*/http://mofa.gov.ps) accessed 28 January 2008.



Frontpage of the website the Palestinian Ministry of Affairs 29 January 2006, retrieved from The Internet Archive, <http://web.archive.org/web/20060206233953/http://www.mofa.gov.ps/> accessed 28 January 2008.

The website was still under modification by 16 April 2007.



Frontpage of the website of the Palestinian Ministry of Affairs as it has been appearing since some point between 16 April and 16 May 2007.

I have not been able to trace the first entry, but it seems reasonable to assume that the relauncing of the website can be related to the National Unity Cabinet and the appointment of Ziad Abu Amr as foreign minister.





## **Appendix II Background, the Ministry of Foreign Affairs**

Background text as it appeared on MOFA's website on 27 September 2003, retrieved from the Internet Archive, [http://web.archive.org/web/20031008113519/www.mofa.gov.ps/about\\_mofa/index.asp](http://web.archive.org/web/20031008113519/www.mofa.gov.ps/about_mofa/index.asp) (last accessed 28 January 2008):

For political reasons, the Oslo accords limited the PA foreign relations scope, nevertheless, the PA established The Ministry of Planning and International Cooperation (MOPIC) to handle international assistance to the Palestinian Territories and developed its assigned mandate to be the ministry responsible for the foreign relations portfolio.

### **The Ministry of Foreign Affairs:**

After formation of the fifth Palestinian government, a new Ministry of Foreign Affairs was established. This Ministry undertakes all the duties associated with a typical foreign ministry in a sovereign country, in the course of managing Palestine's foreign relations that serves its national interests. These functions includes the following functions:

- Organizing of diplomatic and consular representation between the Palestinian National Authority and foreign states and International and regional organizations;
- Establishing cooperation relationships with international and regional organizations and groupings;
- Maintaining contacts with other states through the various embassies and PLO representative offices around the globe.
- Establishing regular contact and cooperation with foreign representative offices in Jerusalem and other embassies designated to the PA;
- Participating in international conferences and international organizations meetings;
- Concluding economic, cultural, scientific, educational, and technical agreements with other states and international institutions;
- Sourcing financial and technical assistance from other friendly states, donors, and international funding agencies and negotiating loan and grant agreements to finance the Palestinian Development Plan (PDP);
- Overseeing Palestinian citizens interests in other states and taking measures to protect their rights pursuant to international agreements and treaties.

- MOFA has significantly rationalized and consolidated the activities of most of the representative offices around the globe. Yet, these functions continue to exact a considerable financial burden and toll on the PA's budget. The Ministry has introduced a variety of cost cutting programs including encouraging a system of non-resident ambassadors as well as the use of email as a standard practice to reduce communications expenses. Nevertheless, as a result of the complicated political situation, the remaining embassies and representative offices were deemed to be vital to promoting Palestinian interests. Accordingly, the Ministry will continue to develop the capacities and competencies of these embassies in preparations for the Palestinian State.
- The overall coordination of International assistance to the Palestinian people.
- Expatriate Affairs and PALSTA Network MOPIC established the Expatriate Palestinians department as a mean to tap the resources and support of Diaspora Palestinian communities around the World and to encourage investment in Palestine. Many Palestinians who immigrated to Europe and the Americas had established successful and influential communities particularly in Central and South America. MOPIC organizes annual Diaspora conferences designed to develop the networking relationships between the expatriates and their home communities as well as to promote private sector and joint venture local-expatriate investment projects.
- As in its capacity as Ministry of Foreign Affairs, the Ministry has a key role in all negotiations held on behalf of the Palestinian National Authority and the State of Palestine.

## Summary

The topic of this thesis is the interplay between political context and Palestinian constitutional development from the inception of the Palestinian Authority (PA) in 1993 until the aftermath of the collapse of the National Unity Cabinet in June 2007.

The 2006 parliamentary elections brought a Hamas majority in the Palestinian Legislative Council. This offset a conflict between the Fatah backed president and the Hamas backed prime minister which culminated in 2007 with the split between Gaza and the West Bank. The recent conflicts between Fatah President Mahmoud Abbas and the deposed Hamas Prime Minister Ismail Haniyeh are here placed in a broader context of Palestinian constitutional history.

The Basic Law was written in the intersection between local power struggles and great power politics. Both the U.S. and the European countries pursued multiple agendas and interests where democracy was one of several competing goals. My first main question is how these various interests have affected Palestinian constitutional development. More specifically, I aim to discuss the development of the executive as envisioned in the Basic Law, and whether the PA has evolved in the direction of constitutionalist or nonconstitutionalist rule.

In 2003 the Basic Law was amended and the Palestinian political system was changed from a presidential to a semi-presidential system by furnishing the executive with a prime minister. The amendment transferred a number of competencies from the presidency to the cabinet. The second main question is whether the cabinet has been able to exercise its powers as laid out in the Amended Basic Law.

By comparing various drafts for the Palestinian Basic Law, the thesis traces the relations between the president and the cabinet as laid out in the Basic Law. The thesis shows that the 2003 amendment was systematically reversed in a process that was initiated by President Yasser Arafat, but that continued under the more reform minded President Mahmoud Abbas.

The lacking ability of the PA executive to impose order on the security forces is well known. This thesis shows that the reversal of the 2003 reforms affected a broad specter of competencies that had been awarded to the cabinet by the constitutional amendment.